NEW ZEALAND WOMEN'S LAW JOURNAL

TE AHO KAWE KAUPAPA TURE A NGĀ WĀHINE

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Natalie Coates
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Annelise Samuels
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EDITORIAL — KŌRERO TIMATANGA

I te tuatahi e mihi ana ki a koutou ngā wāhine toa o Te Aho Kawe Kaupapa Ture a ngā Wāhine. Ki a koutou ngā kaituhi i raranga mai i ēnei tuhinga, tēnā koutou. Otirā, e mihi ana ki te tīma o tēnei kaupapa, ngā ētita, ngā kaitiaki, ngā kaiarotake — e kore e arikarika ngā mihi kia koutou. Ko te tūmanako, mā ēnei momo kaupapa, me ōna kupu, me ōna whakaaro, ka puta ngā hua kia tika, kia pono te ao o te ture nei.

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First, we mihi to those whose stories bring life to the articles included in the Journal. This edition traverses across discrimination to indigenous rights, family violence and coerced offending, and inspiring wāhine in the profession. We hope that sharing these stories will encourage critical conversations about ongoing gendered issues in Aotearoa, inspire change in legal processes, decision making or drafting, and allow greater accessibility in feminist legal academia to thinkers from all backgrounds.

We thank the authors who have contributed and woven together exciting ideas for gender justice reform in the law in Aotearoa and beyond. To those who have considered writing or researching but felt unsupported or held back, whether by your own inhibitions, societal stigmas or by structural barriers to legal publishing, we say kia maia – have courage.

Our deep gratitude to our Deputy Editors, Rachel Bedggood and Romy Wales, for their committed guidance of the Editorial Team and dependable, focused energy. Their sharp eyes for detail have been invaluable. To our Kaupapa Māori Editors, the Editorial Team and the Leadership Team who have spent many hours dedicated to the handling and care of these articles, their authors and the perspectives represented with our articles, kei te mihi nui.

We are grateful for the generosity of spirit and time of our many peer reviewers and supportive publishing professionals, including Mitch Marks and LexisNexis. It has been humbling to work with such talented professionals who strive to uphold the highest standards. We value the knowledge and support

that we have received from all those that we have worked with in editing this edition, and will carry these learnings with us into our future endeavours.

Finally, to the Trustees, thank you for your insightful, genuine and kind support throughout this journey. The high calibre of feminist legal scholarship could only be achieved alongside you all and with your vision.

This year, the Advocacy team has continued to submit on legal issues with a feminist lens. This includes a further submission on the NZLS Independent Review, a letter in support of repeal of s 19 of the Prostitution Reform Act 2003, and submissions on bills to strengthen legal protections for victims of family and sexual violence. The Advocacy team is also developing a podcast, due for release in 2024, which aims to make the Journal's content more accessible.

We would also like to recognise Natalie Coates, who provided the Foreword. We are honoured to have her share whakaaro with us. The timely importance of scholarship like this has been reinforced to us as we see academics like Natalie fighting for fundamental recognition of mana Māori motuhake in shifting political and legal spheres in Aotearoa, and as challenges to law and human rights continue internationally. Toitū He Whakaputanga, toitū Te Tiriti.

Reflecting on previous editions, we stand steadily on the shoulders of a community of wāhine, gender-diverse peoples and allies, from university professors to students, practising lawyers and judges, all committed to bettering our profession and Aotearoa's legal system. As part of this legal community, with recognition of the privilege that we have, comes a responsibility to protect those whose rights are at risk and to amplify where these have been ignored or undermined. We also could not have brought this journal to life without the aroha and patience of our whānau, friends and colleagues. Heoi, we are honoured to have been entrusted with receiving and progressing the stories that follow. We are proud of what this edition achieves and look forward to continuing to serve our profession and our sisters in law.

Erica Burke and Ellen Lellman
Editors-in-Chief
2024

FOREWORD — KUPU WHAKATAKI

In 2012 I was sitting in the hallowed halls of Harvard University where I had chosen to take a paper on "Sex Equality" under the piercing gaze of American feminist legal scholar and activist Catharine MacKinnon. In a classic example of failing to read the room, I had decided to write an essay about the differing gender roles that women and men have in the practice of pōhiri. I critically analysed the case of *Bullock v The Department of Corrections* [2008] NZHRRT 4 where the New Zealand Human Rights Review Tribunal had concluded that a pākehā woman parole officer that had participated in a pōhiri run by the Department of Corrections, was subjected to detrimental treatment by reason of her sex in respect of both the expectation that she would not be a speaker and that she was to sit behind the men. I recall that essay getting the lowest grade I had ever received at university.

I accept that it might have just been a poorly written paper (that I clearly do not hold a grudge about over 12 years later). However, it felt like both the essay and the *Bullock* case itself were sites of cultural collisions. Whilst I may have been brought up to see a beautiful and deeply layered ritual of engagement where both women and men played different but respected roles, the gaze of the law (and my Professor) saw this difference as discrimination that should not be permitted. This encounter left me with a deep discomfort in my puku (stomach) and a sense that the creeping tentacles of colonisation were trying to flex their muscles in a different and more subtle form.

I have a similar discomfort about the current discourse that is occurring around Te Tiriti o Waitangi. We are at this time in a situation where one party to Te Tiriti (the Crown) is unilaterally proposing to introduce a bill into parliament to define the "principles of the Treaty of Waitangi". As currently articulated, the draft principles are inconsistent with the text of Te Tiriti (both language versions) as well as the principles and jurisprudence developed by various independent courts and tribunals over the past almost 40 years. The Crown's proposal seeks to re-write the pillars of the founding constitutional document of our modern nation state by elevating Crown power, stripping Māori of

guaranteed rights and distorting the recognition of hapū rangatiratanga into a property right guaranteed to all. The subtlety and nuance of this full-frontal attack includes not only the selective amnesia around what Te Tiriti says but also the justificatory deployment of the language of "equality" and "sameness".

There is insufficient time and space to do any form of justice to the complexity of the two issues raised in this short foreword. However, I highlight these controversial examples because they illustrate various intersections between indigenous rights, human rights and feminism. When I was in the United States I came across the idea of "intersectionality", a phrase coined by Kimberlé Crenshaw, an African American Law Professor and pioneer scholar on critical race theory. She used the term to describe the double bind of simultaneous racial and gender prejudice that creates obstacles that often are not understood among conventional ways of thinking.

Intersections are a place I seem to find myself a lot. As a child of a Pākehā mother and Māori father, intersecting cultures, families, ideas, languages and food were run-of-the-mill. This has flowed through to my academic and legal career, where I am particularly passionate and interested in the dynamic intersection between tikanga and the state legal system.

Intersectionality is important to understand when we examine the place of wahine Māori within the law and legal profession. Although we are now fortunate to have wahine Māori judges, Professors, Ministers and Presidents of the Law Commission, for my generation (and my tuakana that sit just above me) it is still not unusual to be a "first". In 2022, Justice Kiri Tahana became one of the first wahine Māori to be appointed to the High Court. In 2023, Judge Sheena Tepania was appointed the first wahine Māori Environment Court judge. In the same year, Chief Judge Caren Fox became the first wahine Māori Chief Judge in Aotearoa. There has never been a wahine Māori judge appointed to the Court of Appeal or the Supreme Court.

There are lots of complex reasons for this and we still have a long way to go on a number of fronts. I acknowledge the role of the NZWLJ who, over the years since it has been established, has become an important forum where intersecting tensions, such as those mentioned above, are teased out, ventilated and stress-tested. The Journal provides an invaluable and important space for the contest of ideas around issues that are of particular importance to wāhine in Aotearoa. This year is no different.

Natalie Coates
Ngāti Awa, Ngāti Hine

TUAKANA-TEINA WHAKAWHITI KŌRERO

ME ARO KOE KI TE HĀ O HINEAHUONE: A CONVERSATION WITH CHIEF JUDGE CAREN FOX

ANNELISE SAMUELS

This tuakana-teina[1] *conversation pairs Annelise Samuels (Ngāpuhi), Pou Ture at Whāia Legal, with Chief Judge Caren Fox (Ngāti Porou, Rongowhakaata) of the Māori Land Court. The following kōrero is a discussion of Chief Judge Fox's journey as a wahine Māori navigating te ao ture (the legal world), through the lens of the chosen whakataukī (proverb) "me aro koe ki te hā o Hineahuone". This whakataukī served as a tūāpapa (foundation) for the discussion, grounding the kōrero in te mana o te wahine, and acknowledging the power of each woman's journey to break down barriers and pave the way for other wāhine to follow.*[2]

On 5 July 2023, Judge Caren Fox was appointed Chief Judge of Te Kooti Whenua Māori (the Māori Land Court). Her swearing-in was an auspicious occasion, as the first wahine to be appointed Chief Judge of the Māori Land Court. The event was attended by many of her whānau, colleagues, and members of Te Hunga Rōia Māori o Aotearoa (the Māori Law Society). It was one of those moments that you would always remember having been a part of, even if only as a spectator.

This memory was at the forefront of my mind as we sat together in her chambers, with a notebook and pen at a glass table (that I was trying desperately not to smudge with my nervous hands), to talk about her journey as a wahine Māori navigating te ao ture. As a (somewhat) young wahine Māori lawyer, I was curious to know more about the first Māori woman to be appointed to this influential leadership position. What adversities had she been able to overcome and how? What was she going to do as Chief Judge of the Māori Land Court

1 Tuakana-teina in this context can be understood as a mentor-mentee type relationship, acknowledging that this does not completely capture the depth of this relationship i te ao Māori (from a Māori perspective).

2 This interview was conducted in both te reo Māori and English. Where substantial te reo Māori is used in this article, an English interpretation is also provided.

that would create positive change for our people? Who were the wāhine she looked up to?

But most importantly, I was eager to connect with her as a teina, something that I think every young wahine in any profession craves. This kōrero was important not only because it gave me the opportunity to learn more about Chief Judge Fox and her journey in the law as a wahine Māori. But also because as she shared with me, I could share my own experiences with her.

Our kōrero began as you might expect, with the question, "Ko wai koe?"

I KO WAI IA — WHO IS CHIEF JUDGE CAREN FOX?

"Ko au tētahi o te whānau Kaa, te whānau Huriwai me te whānau Tākoko o te Tairāwhiti,"[3] Chief Judge Fox said. A descendant of the tribes Ngāti Porou and Rongowhakaata, she also has links to Te Whānau a Apanui. She told me that her direct whānau hail from the kāinga tūturu, Rangitukia and Horoera, "i raro i ngā tapuwae o Hikurangi maunga."[4]

"He uri nō Porourangi, nō reira ka tū whakahīhī ahau i runga i tērā whakapapa i ngā wā katoa,"[5] she said firmly.

Chief Judge Fox first spoke about the wāhine who raised her and by whom her life was shaped. As I sat opposite this truly formidable woman, I was stunned to realise that my own fanciful ideas of how the first wahine Māori came to be appointed as a Head of Bench fell woefully short of the truth.

I already knew of Chief Judge Fox's many successes in her career, as I am sure many others do. She was appointed as a Judge of the Māori Land Court on 1 October 2000 and became the Deputy Chief Judge on 20 February 2010. Before joining the bench, Chief Judge Fox was a Law Lecturer at Te Herenga Waka — Victoria University of Wellington, a Senior Law Lecturer and the Director of Graduate Studies at the University of Waikato, and a Harkness Fellow from 1991 to 1992. Chief Judge Fox also holds both a LLM and a PhD. Her PhD thesis addresses the Ngāti Porou legal system.

However, in addition to her accomplishments and accolades, Chief Judge Fox is first and foremost a daughter and a mother.

Chief Judge Fox was raised by her mother, Pākura te Matekino Tākoko. Pākura grew up in Rangitukia, before later leaving the East Coast, and had

3 "I am one of the Kaa whānau, the Huriwai whānau and the Tākoko whānau of the East Coast."
4 "Beneath the footsteps of the mountain, Hikurangi."
5 "I am a descendent of Porourangi, and so I stand proudly upon that whakapapa at all times."

a great love for both her sister, Ngawiki, and the great-grandparents who raised her.

Chief Judge Fox spent memorable times during her childhood with her great-grandmother and recalled vivid memories of a strong, resilient woman. "My great-grandmother's back was bent when I knew her, as she was a hard worker. She was still riding horses into her seventies," she said with a smile.

"She only spoke Māori," Chief Judge Fox said. She informed me that, although her great-grandmother understood English, she refused to speak it on account of the fact that her father had fought for the Pai Mārire movement and the Kingitanga during the 1800s.

"She was a rebel," Chief Judge Fox told me. I quickly asked whether this was a trait that had been passed down to her. "Aspects of that infiltrate my character," Chief Judge Fox admitted with a smile. "It's certainly made me an advocate for te ao Māori while I was a lawyer."

Chief Judge Fox left school at 14 years old and she had the first of her three children at 15 years old. As an adult, Chief Judge Fox returned to her education at Wellington High School to attain her School Certificate and University Entrance. She later attended Te Herenga Waka — Victoria University of Wellington in 1984, shortly after the Springbok Tour. The senior Māori law students at the time included Justice Joe Williams, Ani Mikaere and Tony Waho. This rōpū set up the first Māori law students' study group at Victoria University, now known as Ngā Rangahautira (the Māori Law Students' Society). Chief Judge Fox recounted how she was one of the first cohort to go through university with that study group, and how it boosted numbers of Māori law graduates phenomenally in the following decades. As noted in a recent submission made on behalf of Ngā Rangahautira to the New Zealand Council of Legal Education, the rōpū ran weekly study groups for 100-level Māori law students and saw great success:[6]

> In the first year of operation, Sir Justice Joseph Williams noted that this group achieved an 80 per cent pass rate for LAWS 101 (formally known as Legal System). By contrast, the pass rate for Māori law students in 1981 had been around 20 per cent.

6 Ngā Rangahautira (Māori Law Students' Association of Te Herenga Waka Victoria University of Wellington) Submission to the New Zealand Council of Legal Education – Professional Examinations in Law Amendment Regulations 2021, 30 July 2021 at [4.4].

Reflecting on her own experience attending university in what was a highly politicised environment, Chief Judge Fox spoke about some of the initiatives they spearheaded as young Māori. It was a time of increasing protests against the racism experienced by Māori. "Māori were really staunch then," Chief Judge Fox said, which was unsurprising to me having met many daughters of Ngāti Porou in my life. "They fundamentally believed in by Māori for Māori as a way of progressing Māori development."

As a constant advocate for Māori education, Chief Judge Fox supported the establishment, in 1988, of what is now known as the "Māori Admissions Process" (MAP) within the Faculty of Law at Victoria University. This was the product of a submission made by Māori law students in 1987 that recommended introducing a quota entry system to "encourage more Māori students to attend Victoria University".[7] Today, the Māori Admissions Process reserves 10 percent of available places in second-year law courses for Māori applying under the scheme.[8]

At a women in law seminar I attended during my years at university, I recall one of our speakers addressing the importance of "sisterhood". How we should hold out one hand ahead of us to be led by our tuakana who have gone before, but also to keep one hand extended behind to bring forward our teina who follow. As a graduate of the MAP pathway myself, I smiled at the realisation that the Chief Judge was one of those hands that brought me forward in my own journey in the law. Here was another moment where wāhine had contributed to breaking down barriers, making the path easier for others who come after.

II HE TIROHANGA KI TE KOOTI WHENUA MĀORI[9]

Hineahuone was the first woman, born from the sacred red clay, kurawaka. As her descendants, wāhine Māori carry an innate connection to the whenua (land) that lives on through our whakapapa. If the whenua thrives, so do we. If the whenua withers, so do we. Therefore, it seemed natural for our conversation to flow to the land, particularly as I was sitting with the newly appointed Chief Judge of the Māori Land Court.

7 At [4.13].

8 See Te Herenga Waka — Victoria University of Wellington "Undergraduate selection criteria for entry into second-year of the LLB and 300-level course and elective constraints" <www.wgtn.ac.nz>.

9 A vision of the Māori Land Court.

"How do you see the role of the Māori Land Court in changing the lives of Māori for the better, but also protecting our whenua and ensuring that it remains under our rangatiratanga?" I asked her. Perhaps a question that could be subject to many hours of wānanga, as opposed to this brief kōrero between tuakana and teina. Nevertheless, Chief Judge Fox dove straight in.

"I can't envisage New Zealand without the Māori Land Court," she said firmly. "Other people may be able to, but I can't. What began as a system designed to individualise and alienate land — and it was very successful at doing that — has in the modern era become the only way we can protect the remnants of the lands that are left."

Chief Judge Fox considered it her role to continue advocating for the Māori Land Court to remain a vital aspect of the Aotearoa New Zealand legal system. "We're doing our best to work with the Ministry of Justice and other stakeholders to promote ideas that will assist in that development," she told me. New initiatives are also set to come out of the Māori Land Court. Chief Judge Fox indicated that we can expect to see a banking practice note published soon, informing banks and individuals seeking to use Māori land to secure finance or a mortgage about the procedures that they need to follow.

A working group of Māori Land Court judges with a specific focus on actively engaging with and working through current commercial issues that affect Māori land, such as the New Zealand Emissions Trading Scheme, has also been formed. In addition, the judges and Court staff have put together a climate change policy that acknowledges commitments made under the Paris Agreement and the Climate Change Response Act 2002, which sets the goal for the country to reduce its net greenhouse gas emissions to zero by 2050. Several goals for the Māori Land Court are included in this policy, including supporting judges and staff to be fully informed on climate change and how they might act to mitigate it.

III KO TE MANA O TE WAHINE[10]

My kōrero with Chief Judge Fox began with a whakataukī reminding us of the power and divine strength of wāhine. This knowledge is kept alive in our whakapapa, and our own kōrero tuku iho (oral traditions). However, as we had both experienced in our journeys in the law, the role of wāhine Māori in our world today has been significantly impacted by the influence of colonisation.

10 The power of women.

We spoke about how it is vital to assert our own mana as wāhine through tikanga Māori.

"The whole issue around tikanga Māori and how we incorporate Māori values into the legal system has to be done properly with respect to women," Chief Judge Fox said. "Mana and rangatiratanga are not the sole domain of men, and I don't think that's been highlighted enough in some of the work that's been done to date."

And so, somewhat fittingly, our conversation came to a close with kōrero from the beginning.

We know from our stories of creation, the separation of Ranginui and Papatūānuku and the life that sprang from the union of Hineahuone and Tāne, that there is a symmetry to our way of life. Our Atua and supernatural beings of Māori cosmology were both male and female. Natural objects such as trees, stones, stars, mountains, waters and winds were all imbued with male and female elements.

However, Chief Judge Fox noted that many of our stories have been written down by men, which has in turn skewed the role of wāhine in our own kōrero. We spoke of the pūrākau of Tinirau's whale, Tutunui, and how he was eaten by Kae. In that story, we are told of Hineraukatauri and how she made Kae laugh as she danced and disrobed — however we are not often told that Hineraukatauri is the Atua of dance and music. Hardly anything was said in this pūrākau about what other vital roles she performed in Māori culture.

Coming to more contemporary times, ceremonies are the key space where gendered roles are on display. In her view, Chief Judge Fox considered it would be fair to say that the elevation of the role of men over women in Māori society has become more pronounced. For example, from the early 20th century, the protocols around pōwhiri, whakatau, poroporoākī and marae have evolved to develop sharp distinctions based on gender. There is a general understanding that women do not speak during ceremonial occasions, outside of karanga. Men follow women onto the marae, however once at the paepae, men take the front seats while women sit at the back or on the floor.

One question we considered was whether it was possible that we have adopted a form of tikanga or kawa that overly elevates the tapu of men. "The tikanga is that the manuhiri and tangata whenua do what is required to whakanoa. You only need the speakers there to do that. Otherwise, the balance

of mana between the male and female is the same. There's no reason why the men all go to the front," Chief Judge Fox said, considering the example of seating on the paepae. "It's not tikanga — it's not kawa." Growing up, "other than the paepae going first, it was mixed between male and female," Chief Judge Fox said. It was not the case that all the men go first and then all the women go next, as we so often see today.

In saying that, this must be prefaced by an acknowledgment that tikanga is highly contextual and varies from iwi to iwi, and hapū to hapū. Furthermore, this raises broader questions about the inclusion of takatāpui and the ongoing place of gendered roles.

Chief Judge Fox believes that balance needs to, and can, be restored while still maintaining the appropriate tikanga and kawa of the rohe. She referred to the practices of the Waitangi Tribunal as an example. Hearings and other proceedings of the Waitangi Tribunal are held in both the Waitangi Tribunal Head Office building and other neutral venues, and sometimes the tikanga or kawa has reflected that. During the Waitangi Tribunal hearings for the New Zealand Māori Council and Porirua ki Manawatū claims, Tania Simpson and Chief Judge Fox both conducted karanga, mihi whakatau, and poroporoākī. Chief Judge Fox also described instances where women were free to assume seats for pōwhiri and mihi whakatau (other than the seats set aside for kaikōrero) that reflected their status as presiding officers, or as a member, Director or Deputy Director of the Waitangi Tribunal.

"These are the sorts of accommodations that I want people to know can happen, and judges need to know it can happen," Chief Judge Fox emphasised. We are taught that tikanga is flexible — a living set of rules by which we live our life that is malleable enough to adapt to the modern day. In my experience, it is also the case that it takes a woman who is strong in her own convictions to bring about that change, something which Chief Judge Fox has done and I have no doubt will continue to do.

Me aro koe ki te hā o Hineahuone. Pay heed to the power of women.

Justice Tahana, in an earlier edition of the New Zealand Women's Law Journal, said that "[this] whakataukī reminds us to honour the strength and life force of women. It also speaks to the importance of creating space so that the experiences of all wāhine are heard".[11]

11 Kiri Tahana "Kupu Whakataki — Foreword" (2022) 7 NZWLJ 6 at 6.

Listening to Chief Judge Fox speak, I was reminded again of how integral it is to have indigenous women in leadership positions. Not only as someone to carve out a pathway for other Māori women to follow, but as a reminder to hold on to every unique element of ourselves that make us indigenous women.

We are descendants of Hineahuone, crafted from the sacred red clay kurawaka. We are mothers, sisters and daughters. We are movers and shakers, rebels and leaders. We are wāhine.

WRONGFUL CONCEPTION: A FEMINIST APPROACH TO THE RECOVERY OF CHILD-REARING COSTS IN AOTEAROA

Geneviève Barry*

The reality of caregiving in Aotearoa New Zealand is that women continue to disproportionately carry the responsibility of raising children. In wrongful conception cases, where deliberate and permanent steps have been taken to prevent that exact outcome, women are most affected by a trifecta of resulting gendered harms: the unwanted experience of pregnancy and childbirth, the unplanned financial costs of raising a child, and, most importantly, the loss of reproductive autonomy. Although contentious, only the first has been fully acknowledged in courts around the world. Today, claimants are still unable to recover financially from the life-long impacts of wrongful conception. This is particularly true in New Zealand as the limited compensation allowed under the Accident Compensation Act 2001 bars any corresponding claim at common law and vice versa. Claimants find themselves in an impossible situation and in effect are punished for taking reasonable measures to exercise their human right to reproductive autonomy. This article contends that given the gendered nature of harm in wrongful conception, the socio-economic consequences of the inadequate legal and policy responses are discriminatory and warrant a retraction of the statutory bar. Wrongful conception claimants can only hope to be fully compensated at common law, where Aotearoa's progressive courts can extend case law to judicially defend reproductive rights and appropriately compensate victims.

Disclaimer: The author recognises that not all persons who experience pregnancy and birth identify as women and that parenthood may be experienced irrespective of gender identity. This article uses the word "woman" and the pronouns "she" and "her" to reflect the primarily gendered nature of harm in wrongful conception. In doing this, the author does not intend

* LLB(Hons)/BA from the University of Canterbury. This article was originally submitted as a paper for the author's LLB(Hons) degree. The author would like to thank her supervisors Ursula Cheer and Stephen Todd, and Professor Annick Masselot, for their valuable insight and guidance. She also wishes to thank her family and friends for their support.

to exclude or ignore the experiences and perspectives of non-binary and transgender persons, who may also suffer from the same or similar harms.

I INTRODUCTION

The ability to choose when to have children, determine family size or abstain from parenthood altogether are normal expectations.[1] The availability of various contraception methods and the promotion of family planning services have made this a reality. Together, social attitudes and medical advances have raised novel legal issues of duty and liability in the field of negligence, evident through the development of wrongful conception actions.[2] These typically involve negligently-performed sterilisation operations or misinformation regarding the patient's fertility. As a result, the patient falsely believes they can dispose of contraception in sexual relations and unwillingly becomes a parent.

Whether the costs of bringing up the unplanned child are recoverable has been highly contested. This area of law has been dubbed a "mess"[3] with a "troubled past and future".[4] Two questions the courts have grappled with are whether the pregnancy, childbirth and subsequent parental responsibilities amount to actionable damage and, if so, how far the medical professional's liability should extend.[5] Jurisdictions have taken drastically different approaches in reaching their judgments. Moral and policy considerations have arguably blurred the legal landscape to the detriment of legal certainty and consistency. The issue lends naturally to feminist analysis as unjustified departures from standard negligence principles are contended to be discriminatory.[6]

This article will attempt to make sense of this "mess"[7] by focusing on New Zealand, one of the rare jurisdictions to have strayed from the traditional tort system by adopting a no-fault accident compensation scheme. Using a feminist jurisprudence lens, the article will assess the adequacy of Aotearoa's accident

1 Nicolette Priaulx *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, Milton Park 2007) at x.

2 Nicolette Priaulx "Joy to the World! A Healthy Child is Born! Reconceptualizing 'Harm' in Wrongful Conception" (2004) 13(1) Soc Leg Stud 5 at 6.

3 Priaulx *The Harm Paradox*, above n 1, at 63.

4 Priaulx "Joy to the World!", above n 2, at 5.

5 *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL); *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97; and *Rees v Darlington Health Board NH Trust* [2004] 1 AC 309 (HL).

6 Ffion Davies "Children as a Blessing: A Reason for Undermining Autonomy?" (LLB (Hons) Dissertation, University of Otago, 2018) at 10.

7 Priaulx *The Harm Paradox*, above n 1, at 63.

compensation scheme in respect of wrongful conception claims. It will explore whether a common law claim for child-rearing costs in wrongful conception is more appropriate and should be allowed in New Zealand. Feminist legal theory in the context of wrongful conception will first be introduced. The two key contrasting approaches in wrongful conception, namely the UK and Australian common law positions, will then be discussed. Finally, the Aotearoa experience will be considered in light of the Accident Compensation Act 2001 and New Zealand case law.

II FEMINISM AS A FRAMEWORK

A Feminist Legal Theory

Feminist jurisprudence highlights the gendered nature of harm in wrongful conception. Approaching the issue through a feminist lens exposes how previous decisions have failed to adequately protect women's reproductive rights and will clarify what needs to be remedied to defend reproductive autonomy as a principle and human right.

The universality of the law has for some time been under scrutiny by minorities and contemporary intellectual currents. Critical among them, feminist legal theorists hold that the law does not, per se, produce *right answers* given the patriarchal social structure from which it originated.[8] They posit that the law reflects social inequalities and perpetuates the systemic oppression of minorities. Despite various schools of thought, feminists are united in their belief that society is patriarchal.[9] Feminist jurisprudence accordingly examines the role of the law in supporting and perpetuating patriarchy.[10]

Systemic gender injustice occurs when harms suffered by women are measured against a standard conceived without them in mind.[11] Feminist legal theory uncovers the way tort law might swiftly recognise and remedy certain harms whilst overlooking others.[12] This is because harm is often gendered. Feminist legal theory challenges traditional constructions of the notion of harm in tort law by bringing the experiences and perspectives of women to the

8 Margaret Thornton "Postscript: Feminist Legal Theory in the 21st Century" (2020) 9 Laws 16 at 16.

9 D Kelly Weisberg *Feminist Legal Theory: Foundations* (Temple University Press, Philadelphia, 1993) at xvii.

10 At xvii.

11 Joanne Conaghan "Tort Law and the Feminist Critique of Reason" in Anne Bottomley *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, London, 1996) 47 at 50. The "reasonable man" standard is a clear illustration of this.

12 At 48.

centre of judicial processes in order to deconstruct the widely accepted notion that the law is gender-neutral and objective.[13] It seeks to develop ideas for legal reform with a view to recognise the diversity of individuals under the law for fairer outcomes and a more inclusive society.

B The Necessity of a Feminist Approach to Wrongful Conception

Law is one of the most powerful tools for social reform and reconstruction.[14] Tort law exists to protect bodily integrity and moral personhood, and enforce individual self-determination and autonomy.[15] It has important normative and narrative roles as it is concerned with harms suffered by the person.[16] It is therefore no surprise that tort law has long been relied upon by feminist legal scholars as a vehicle for legal and social reform.

Reproductive torts are an intrinsically gendered area of law. The imbalance of harm suffered by women and men is self-evident in wrongful conception. Both sustain a loss of reproductive autonomy, however they experience harm differently. Women in these cases sustain multiple harms: mothers and fathers suffer jointly from consequential economic loss, but only mothers experience pregnancy and childbirth. Women's autonomy is further undermined as, despite evolving attitudes, the responsibility of childcare still overwhelmingly falls to the mother, with parental roles and the relative importance associated with one's parental role vis-à-vis other roles remaining gendered.[17] Without diminishing the validity and importance of a father's claim, women are disproportionately impacted by the law and decision making in this area.

This seems archaic and at odds with life as we know it in 2024. In Western countries, active fatherhood has become the new norm and women today are better able to reconcile parenthood and employment than ever before.[18] If anything, normative and gendered expectations have become looser for

13 Martha Fineman "Feminist Legal Theory" (2005) 13 Am UJ Gender Soc Poly & L 13 at 14.

14 Jane Larson "'Imagine Her Satisfaction': The Transformative Task of Feminist Tort Work" (1993) 33 Washburn LJ 56 at 57.

15 At 57.

16 Jennifer Wriggins "Toward a Feminist Revision of Torts" (2005) 13 Am UJ Gender Soc Poly & L 139 at 140.

17 Taschi Keren-Paz "Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law" (2019) 27 Fem LS 33 at 43–44.

18 Julia Nentwich "New Fathers and Mothers as Gender Troublemakers? Exploring Discursive Constructions of Heterosexual Parenthood and their Subversive Potential" (2008) 18 Fem Psychol 207 at 208; and Klaus Preisner and others "Closing the Happiness Gap - The Decline of Gendered Parenthood Norms and the Increase in Parental Life Satisfaction" (2019) 34 Gen Soc 31 at 32.

women but stricter for fathers as the latter are now entrusted with parental duties.[19] If this is indeed the case, then harm in wrongful conception cases is no longer disproportionately suffered by women. A feminist claim would no longer be valid.

These ground-breaking advances hide the complex reality of caregiving. Women have increasingly entered the labour market in recent decades and yet, in most cases, this has only minimally impacted the sharing of household and caring responsibilities.[20] While men must meet new parental expectations, these often remain light and leisure-oriented.[21] The father's involvement is habitually limited to activities such as bathing or playing, as opposed to daily chores of cooking or housework.[22] Without excluding the growing examples of shared or single parenthood, men are still traditionally "part-time fathers" and "baby entertainers" whilst women remain the primary caregivers.[23] Women are balancing unsustainable expectations of having a career whilst continuing to provide "intense mothering" for their children.[24]

Despite being considered a global leader in fighting gender inequality, New Zealand is no exception.[25] With Kiwi women earning on average 8.6 percent less than men per annum, a gap much wider for women who are Māori, Pasifika or belong to any other ethnic minority, they also tend to be the primary caregivers of their children.[26] Research has further shown that

19 At 33.

20 Eugenia Caracciolo di Torella and Annick Masselot *Caring responsibility in EU law and policy: who cares?* (Routledge, London, 2020) at 14.

21 Preisner and others, above n 18, at 49.

22 Nentwich, above n 18, at 208.

23 Jane Sunderland "Baby entertainer, bumbling assistant and line manager: discourses of fatherhood in parentcraft texts" (2000) 11 Discourse & Society 249 cited in Nentwich, above n 17, at 208. See also Preisner and others, above n 18, at 49.

24 Preisner and others, above n 18, at 36. This ideal defines appropriate mothering as time-, energy-, money-consuming and emotionally draining. In this sense women work twice as much as their male counterparts as their domestic and caregiving work is "invisible". This term refers to the undervalued nature of unpaid work primarily done by women. This type of work is indeed consistently ignored in economic analyses despite being essential. See Amit Kaplan, Maha Sabbah-Karkabi and Hanna Herzog ""When I Iron My Son's Shirt, I Feel My Maternal Role": Making Women's Invisible Work Visible" (2020) 41 J Fam Issues 1525 at 1526 and 1529.

25 Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) at 28.

26 Stats NZ "Household Labour Force Survey" (June 2023)| < https://www.stats.govt.nz/news/income-growth-for-wage-and-salary-earners-remains-strong/>.

parenthood exacerbates pre-parenthood wage gaps in Aotearoa.[27] While employed mothers' median work hours drop after birth, men work the same median hours before and after becoming fathers.[28] Similarly, women's hourly wages are significantly affected by parenthood, with a drop of 4.4 percent compared to the wage they could have expected without children.[29] Such a gendered labour response to parenthood sets women on a course of lower life earnings than their male counterparts.[30]

There is a disconnect between social expectations shifting towards what is starting to look like gender equality and the putting into practice of these new norms, and everyone is suffering. Men are expected to be active and involved fathers yet their workplace might not grant them the time nor flexibility,[31] in turn preventing women from sustainably balancing career and caregiving, if they so desire. This is a forbidding reality for mothers who choose to have and raise children, let alone for those upon whom parenthood is thrust against their will. Despite a decrease in the stigma around childlessness, a woman who chooses not to have children continues to be judged as "selfish and self-interested" and "separate from society".[32] The decision to permanently abdicate the ability to conceive is all the more significant, whether it be by women or men.

The harm suffered in wrongful conception is undeniably a gendered harm,[33] a concept developed to highlight the harms suffered by women as women.[34] Tort law in this area has the potential to redress social inequalities and not simply reflect the status quo.[35] A feminist approach is not only relevant but necessary if the law is to accomplish its dual purpose of social justice and fair outcomes. More than just another perspective, feminism goes to the heart of the matter as it brings into analysis and decision making the full extent of

27 Isabelle Sin and Gail Pacheco "How parenthood continues to cost women more than men" *The Conversation* (online ed, New Zealand, 29 May 2018) https://theconversation.com/nz. The full research can be found at Isabelle Sin, Gail Pacheco and Kabir Dasgupta *Parenthood and Labour Market Outcomes* (Ministry for Women |Minitatanga mō ngā Wāhine, Wellington, 2018).

28 Sin and Pacheco, above n 27. Employed mothers' work hours drop after birth from a pre-parenthood median of 40 hours to a post-parenthood median of 27 hours. Men however work the same median of hours both before and after becoming fathers.

29 Sin and Pacheco, above n 27.

30 Above n 27.

31 Preisner and others, above n 18, at 36.

32 At 31 and 39; and Priaulx *The Harm Paradox*, above n 1, at 124.

33 Keren-Paz, above n 17, at 35.

34 Priaulx *The Harm Paradox*, above n 1, at 5.

35 At xii.

people's experiences and perspectives and places them, in all their diversity, at the centre of the legal issue. A feminist approach offers the prospect of a different future,[36] where social constructs of gender roles no longer affect the application of legal principle and logic. The common law is the general arbiter of wrongful conception. A feminist analysis of current common law approaches will highlight the misconceptions around harm and their implications for individuals.

III THE EXISTING LEGAL CONTEXT

To understand Aotearoa's approach to wrongful conception and how it should change, the current legal landscape must be considered and critically analysed from a feminist perspective. The leading cases come from the courts of England and Wales, and Australia, and illustrate the two opposing views in this area of law.[37] In the first approach, the birth of a child cannot be interpreted as harm for the purposes of a claim, and the claim cannot be successful. This view was followed by Ireland and Canada.[38] The second approach treats a claim for wrongful conception like any other medical negligence claim, subject to established principles of negligence, and the claim would likely succeed. The principles of negligence are the same across England and Wales, Australia and New Zealand: a duty of care must be breached, and damage must be caused by that breach which is sufficiently ascertainable.[39] These principles and case law from England and Wales, and Australia have influenced New Zealand courts in their assessment of wrongful conception claims, somewhat giving New Zealand the benefit of hindsight against the backdrop of its accident compensation scheme.[40]

Before discussing New Zealand's approach to wrongful conception in Part IV, Part III considers the responses to wrongful conception in the United Kingdom and Australia. It will then dissect the feminist legal issues arising from cases in both jurisdictions.

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36 Janice Richardson and Erika Rackley *Feminist Perspectives on Tort Law* (Taylor & Francis Group, London, 2012) at 1.

37 Stephen Todd "Accidental Conception and Accident Compensation" (2012) 28 PN 196 at 196.

38 *Byrne v Ryan* [2007] IEHC 207, [2009] 4 IR 542; and *Mummery v Olsson* [2001] OJ No 226 (Ont Sup Ct J).

39 Stephen Todd *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 149–150.

40 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [42], [49], [76] and [80]; and *J v Accident Compensation Corp (ACC)* [2017] NZCA 441, [2017] 3 NZLR 804 [*J v* ACC] at [39]–[40] and [69].

A United Kingdom (UK)

1 McFarlane v Tayside Health Board

Despite an initial rejection in 1983,[41] claims for child-rearing costs were consistently awarded for 17 years in the UK.[42] Under standard principles of negligence, these claims were for economic loss directly consequential upon the negligent act. As a result of clear application of legal principles and reasoning, the loss was foreseeable and directly contemplated by both the doctor and parents when seeking the doctor's specific services.[43] The matter was settled.

The issue arose again in 2000 with *McFarlane v Tayside Health Board*.[44] Already the parents of three children, the McFarlanes had decided they did not want to further expand their family. Mr McFarlane underwent a vasectomy, which was negligently performed, and was wrongly assured by the doctor that he could no longer conceive. The McFarlanes accordingly stopped using contraception. Mrs McFarlane later became pregnant and gave birth to a fourth child. The couple decided to bring forward two claims for damages: "the mother's claim" for the physical pain and suffering associated with pregnancy and childbirth; and "the parents' claim" for the child-rearing costs.

On appeal from the Tayside Health Board, the majority allowed the mother's claim, but the parents' claim was unanimously rejected, although on a variety of grounds. An estimate of the costs necessary to raise the child, although not impossible to draw up, would have been too rough and arbitrary at best.[45] It would not have been "fair, just and reasonable" to impose such a duty upon the appellants.[46] Their Lordships used the metaphor of a commuter on the London Underground to illustrate that any ordinary person's inarticulate sense of right and wrong directed against the award of such damages.[47] The principles of distributive justice further supported this view.[48] Awards of damages would have been disproportionate to the "voluntary

41 *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522 (QB).
42 *Emeh v Kensington* [1985] QB 1012, [1984] 3 A ER 1044; *Thake v Maurice* [1985] 2 WLR 215 (CA); *Anderson v Forth Valley Health Board* [1998] SLT 588; *Allan v Greater Glasgow Health Board* [1998] SLT 580.
43 Laura Hoyano "Misconceptions about Wrongful Conception" (2002) 65 MLR 883 at 884.
44 *McFarlane*, above n 5.
45 At [75] per Lord Slynn.
46 At [76] per Lord Slynn.
47 At [82] per Lord Steyn.
48 At [82] per Lord Steyn.

and comparatively minor operation" in question.[49] To leave the benefits of parenthood out of account would not have been fair, just nor reasonable.[50] These benefits being incalculable, damages could not be recoverable.[51] It was ultimately held that the birth of a healthy child is always a "blessing" and must be regarded as such.[52]

(a) Issues

Several issues arise from the *McFarlane* decision and have been widely discussed by academics in the years following the case. Key issues arising from the *McFarlane* decision are discussed in turn below. First, their Lordships erred in relying on subjective policy considerations, to the detriment of established legal principles. Second, to somewhat quantify the scope of harm, they set off the hardships of parenthood against its benefits. Third, their Lordships inappropriately substituted the corrective justice baseline for distributive justice. Finally, their conceptualisation of harm failed to accurately identify and recognise the negligently performed vasectomy as the source of harm and its impact.

Policy was a central factor in their Lordships' reasoning.[53] Awarding child-rearing costs would require the value of a child's life to be quantified in monetary terms therefore commodifying a human life. But the award of child-rearing costs does not put in contention the value of human life, which is actually legally irrelevant.[54] The concern that allowing this claim would violate the sanctity of human life is speculative from a feminist perspective. If such policy considerations were deal-breakers for their Lordships, would rejecting the claim not raise similar policy concerns regarding the doctor's responsibility? Denying the claim arguably provides legal immunity to medical practitioners who have an irrefutable duty of care towards patients.[55] Alternative reasoning not only ignores the realities of child-rearing, notably its substantial and inevitable costs, but places medical practitioners above the law. While relevant policy factors should be weighed by the courts where appropriate, "the

49 At [91] per Lord Hope and [105] per Lord Clyde.
50 At [97].
51 At [97].
52 At [114].
53 Priaulx "Joy to the World!", above n 2, at 10. See also Lady Justice Hale "The Value of Life and the Cost of Living – Damages for Wrongful Birth" (2001) 7(5) BAJ 747 at 755.
54 *Cattanach v Melchior* [2003] HCA 38, (2003) 199 ALR 131 at [6] per Gleeson CJ.
55 At [149].

objective of the judges is the formulation of principle."[56] Policy and principle are distinct. If the creation of principle entails a degree of policy risk:[57]

> …the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament … If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

This is what previous courts relied on during the 17 years that damages were consistently awarded in the UK.[58] Parliament had not legislated an alternative to the common law, and it could reasonably be inferred that Parliament saw no reason to do so.[59] Although this was denied by their Lordships,[60] policy considerations seem to have dominated the entire proceeding, and flawed ones at that.[61]

Quantifying damages was another obstacle. To avoid overcompensating the claimants, their Lordships attempted to weigh the benefits of parenthood against its disadvantages. These benefits, although invaluable and "incalculable" in their Lordships' eyes, somehow far outweighed the disadvantages.[62] Accordingly, claimants in wrongful conception are not harmed by the unsolicited parenthood they so deliberately sought to avoid, but have in fact *benefitted* from it.[63] The claimants' experience of pregnancy, childbirth and parenthood is not only discounted but completely upturned. In reality, only those who have taken considerable measures to permanently end their reproductive capacity can determine whether the benefits of parenthood outweigh its detriments in their circumstances.[64] If anything, the fact alone that persons take such measures suggests that children are not always a "blessing".[65] As Nicolette Priaulx writes:[66]

56 Lord Scarman in *McLoughlin v O'Brian* [1983] 1 AC 410, 430 quoted in Hoyano, above n 44, at 890.
57 Lord Scarman in *McLoughlin v O'Brian* [1983], quoted in Hoyano, above n 44, at 890.
58 Hoyano, above n 44, at 890.
59 At 890.
60 *McFarlane*, above n 5, at [76] per Lord Slynn, [83] per Lord Steyn, [95] per Lord Hope, [100] per Lord Clyde, [108] per Lord Millett.
61 Priaulx *The Harm Paradox*, above n 1, at 179.
62 *McFarlane*, above n 5, at 87 and 114.
63 Priaulx *The Harm Paradox*, above n 1, at 107 (emphasis added).
64 Priaulx "Joy to the World!", above n 2, at 12.
65 *McFarlane*, above n5, at [114] per Lord Millett.
66 Priaulx "Joy to the World!", above n 2, at 12.

> In making this decision, an intricate network of values and subjective preferences will determine what importance a child will hold in their lives; it should not be the role of the court to trivialize those values by reference to the abstract goods of children in society.

Therefore, the off-setting exercise undertaken by their Lordships twisted the reality of the claim and swept the perspectives of individuals seeking to exercise their reproductive autonomy under the carpet.

The substitution of the default rationale of tort law, namely corrective justice,[67] for distributive justice is another problematic issue. Having acknowledged the likely success of the McFarlanes' claim under corrective justice,[68] the lack of explanation for why their Lordships chose to depart from this basis highlights the unprincipled nature of their decision. The principles of distributive justice, being the allocation of burdens across society as a whole, cannot take into account the gendered nature of the harm. Under distributive justice, "the 'losers' will always be women" as they are disadvantaged from the outset.[69] A departure from precedent justified by subjective policy concerns in these circumstances threatens the certainty and coherence of the law. It is nothing short of discriminatory towards women and affects all claimants in wrongful conception.

A further question arises: how were their Lordships able to assess the mother's pain and suffering in monetary terms, but refused to do so for child-rearing costs on the basis that calculation would be too rough and arbitrary? Would such harm not be easier to calculate, as it is pecuniary by nature?[70] If pregnancy and childbirth are personal injuries, it follows that at least the mother's economic loss is directly consequential upon those injuries, and the father's economic loss directly consequential upon the failed sterilisation. Their Lordships all agreed upon child-rearing costs being reasonably foreseeable[71] and being caused by the negligent act,[72] making their line drawing all the more arbitrary. The doctor's duty of care is capable of being extended to include the

67 Hoyano, above n 44, at 883.

68 *McFarlane*, above n 5, at [82].

69 Priaulx *The Harm Paradox*, above n 1, at 5.

70 *Cattanach*, above n 5, at [297] per Callinan J: damages such as rearing costs can actually be measured reasonably accurately, unlike damages for pain and suffering.

71 *McFarlane*, above n 5, at [75] per Lord Slynn, [82] per Lord Steyn, [95] per Lord Hope, [113] per Lord Millett.

72 At [104].

claimants' economic loss.[73] Their Lordships inadvertently recognised part of the harm by allowing the mother's claim.[74] They appear to have gone to great lengths to find any way of denying the claim, refusing to award the full remedy and to recognise the true scope of harm.

The key contention in *McFarlane* under a feminist lens relates to the House's conceptualisation of harm. By only recognising the physical aspects of the unwanted pregnancy, the House failed to address the true scope of harm in wrongful conception. Their Lordships failed to consider and conceptualise harm from the perspective of the claimants, both of whom suffered a loss of their reproductive autonomy which will affect them for the rest of their lives. A feminist perspective would go further in recognising that it is the mother who has and will continue to disproportionately suffer from the immediate and long-term consequences of the negligent act. Without even going into the question of pre-existing socioeconomic disadvantage, the negligent undermining of reproductive autonomy disproportionately affects those with female reproductive systems as only they can experience pregnancy and childbirth, so it is therefore a gendered harm.[75] The ability to decide whether and when to reproduce, and what this will look like is the linchpin of women's equality in the realm of reproduction.[76] Courts cannot take a gender-neutral approach here. Gender injustice arises where the "application of seemingly equal rules to facially non-gendered harms [ignores] background conditions which disadvantage women", resulting in a discriminatory or otherwise problematic devaluation of harms primarily suffered by women.[77] The inadequate protection awarded to date in wrongful conception claims is a reflection of the law's failure to appropriately respond to women's experiences.[78]

The notion of harm must therefore be reconceptualised to acknowledge that pregnancy is a unique experience,[79] and must incorporate the fundamental emotional and psycho-social aspects of injury and harm as suffered by the claimant.[80] Otherwise, the "[r]efusal to acknowledge the fuller range of

73 Davies, above n6, at 8.
74 Priaulx *The Harm Paradox*, above n 1, at 92.
75 Keren-Paz, above n 17, at 40.
76 Priaulx "Joy to the World!", above n 2, at 16.
77 Keren-Paz, above n 17, at 39.
78 At 35.
79 Priaulx *The Harm Paradox*, above n 1, at 42.
80 Nicolette Priaulx "Negligence and Reparation for Harm" in Richardson and Rackley, above n 37, at 44 and 50.

interests that individuals seek to protect both excludes and misrepresents the reality of their motivation".[81] Making autonomy the guiding principle in wrongful conception claims would encourage the recognition of a loss of reproductive autonomy as a social and legal wrong, rather than "part of the normal vicissitudes of life".[82]

(b) *Post*-McFarlane *Developments: the Question of Disability in Wrongful Conception*

McFarlane remains the leading case in UK today, despite its lack of clear ratio creating serious confusion for lower courts in subsequent cases.[83] Two notable developments were *Parkinson v St James and Seacroft University Hospital NHS Trust*[84] and *Rees v Darlington Hospital Trust*.[85] The facts of these cases both introduced new considerations in the application of *McFarlane* and highlighted the incoherence of the arguments held in that case. In *Parkinson*, the unplanned child was born with acute disabilities. In *Rees*, the mother's severe visual impairment was the reason she had opted for sterilisation.

(c) *Overview of* Parkinson *and* Rees

Both *Parkinson* and *Rees* sought to carve out an exception to the *McFarlane* precedent. *Parkinson* held that the limit imposed in *McFarlane* (the recoverability of costs associated with pregnancy and childbirth only) was appropriate only in the case of a healthy child. A child with disabilities required additional care and expenditure.[86] In those circumstances, it became fair, just and reasonable to award compensation for these additional costs. Could this principle also apply to the case of a parent with disabilities, as in *Rees*? Although the circumstances in both cases were somewhat interchangeable, the claimant in *Rees* was unable to recover additional costs: her child did not suffer from a disability, and the *McFarlane* precedent stipulated that costs could not be recovered in the case of an able-bodied child.[87] Ms Rees was instead awarded a conventional lump sum of £15,000 as a means to acknowledge the legal wrong suffered.

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81 Priaulx "Joy to the World!", above n 2, at 16.

82 Basil Markesinis *Always on the Same Path* (Hart, Oxford, 2001) at 81. See also Richardson and Rackley, above n 37, at 40.

83 Hoyano, above n 44, at 884.

84 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97.

85 *Rees v Darlington Health Board NHS Trust* [2004] 1 AC 309 (HL).

86 At [50]-[52].

87 At [114]-[116].

2 *Reconceptualising Harm*

Lady Justice Hale in *Parkinson* brought a new and female perspective to the debate. Perceptible throughout her judgment is a real understanding of the unique hardships faced by women throughout their reproductive lives. She identified the harm as being an invasion of the right to bodily integrity; the first and most important interest protected by torts.[88] She emphasised that this harm extends far beyond the financial costs of raising the child and is life-lasting:[89] "[w]hatever the outcome, happy or sad, a woman never gets over it … it is not possible, therefore, to draw a clean line at the birth."[90] All consequences, financial and beyond, flow from the initial invasion of bodily integrity and personal autonomy.[91] Lady Justice Hale also highlighted that, although many men experience similar hardships, it is women who remain disproportionately affected.[92] Her conception of harm contrasts strongly with the one adopted by their Lordships in *McFarlane* and makes clear that child-rearing costs in wrongful conception should be recoverable.

(a) Disability: an Exception to the "Blessing" of Parenthood?

The judgment in *Parkinson* is nonetheless difficult to reconcile with *McFarlane*.[93] If these costs cannot be recovered for a healthy child, unless one were to expressly recognise that "a child with disabilities is not a blessing", there is no legally sound basis for the *Parkinson* exception to *McFarlane*.[94] Thus, the precedent in *McFarlane* that every child is a blessing is hypocritical and its application can result in blatant discrimination.[95] While caring for a child with severe disabilities might profoundly impact the lives of the parents, the same can be said of *any* unplanned child.[96] The re-conceptualisation of harm in

88 *Parkinson*, above n 85, at [56].

89 At [71] per Hale LJ: "The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, seven days a week, all year round, until the child becomes old enough to take care of himself."

90 At [63] and [73].

91 At [73].

92 At [93] per Hale LJ: "The primary invasion of bodily integrity and autonomy is suffered by the mother… Of the two types of harm, one can only be suffered by her. The other in my view is properly conceptualised as the obligation to care for and bring up the child. That too is, in the great majority of cases, primarily born by her."

93 Priaulx *The Harm Paradox*, above n 1, at 60.

94 At 62.

95 Owen Bradfield "Healthy Law makes for Healthy Children: *Cattanach v Melchior*" (2005) 12 JLM 305 at 311.

96 Priaulx *The Harm Paradox*, above n 1, at 66.

Parkinson was therefore still misapplied by the Court of Appeal who, as in *McFarlane*, became preoccupied with the value of the child rather than the loss of reproductive autonomy. The latter is the source of the injury and harm, not the child. Disability could, however, become relevant later in the calculation of damages. A feminist legal perspective maintains the focus on those who have suffered the harm and therefore continues to be the most appropriate lens through which wrongful conception should be approached.

Similarly, without dismissing the hardships suffered by Ms Rees and all parents living with a disability, *Rees* differentiates able-bodied parents' loss of reproductive autonomy from the loss suffered by disabled parents. It better values the latter, but "[i]dentifying disability with incapacity… fosters a culture of helplessness and victimhood".[97] *Parkinson* and *Rees* not only perpetuate but deepen the stigmatisation of those living with disabilities,[98] having the opposite effect of what their Lordships likely intended. These decisions inadvertently encourage further marginalisation of vulnerable groups in society and are arguably just as dangerous as *McFarlane*. As above, the question of disability should only become relevant when assessing damages, which, in cases like *Parkinson* and *Rees*, may be higher to reflect individual circumstances. As in *Rees*, a woman who lives with a disability and experiences wrongful conception suffers in a way that is intersectional, as the different harms have a compounding effect. This must be taken into consideration. It is uncertain whether a conventional lump sum offers an appropriate solution. The idea first arose in *McFarlane* and was applied in *Rees*.[99] Although triple the amount suggested in *McFarlane*, the arbitrary sum in *Rees* does not adequately recognise the harm suffered. To award a conventional sum is firstly to deviate from the principle of full compensation.[100] Second, the amount awarded pales in significance to the severe and long-lasting effects of the negligent act,[101] indicating a lack of reasoned and principled decision making. Although a

97 Hoyano, above n 44, at 900–901; and Priaulx *The Harm Paradox*, above n 1, at 71; and *Cattanach*, above n 55, at [166].

98 Hoyano, above n 44, at 900–901.

99 *McFarlane*, above n5, at [114] per Lord Millett (his Lordship suggested that the sum be no more than £5,000, which shows how little he valued the idea); *Rees*, above n 86.

100 Keren-Paz, above n 17, at 44. Keren-Paz points out that a conventional sum is inconsistent with previous case law — although not in the context of wrongful conception, in the case of *Chester v Afshar* [2004] UKHL 41, a doctor failed to inform the patient of a minor risk in the operation undertaken. The patient suffered personal injury as a result but was fully compensated to redress her loss of autonomy.

101 At 44.

step in the right direction, the court in *Rees* trivialised the harms suffered by the claimant instead of rolling up its sleeves to find appropriate and adequate remedies. A subjective feminist approach is therefore required in order to properly compensate the claimant for the specific harm suffered.[102]

B Australia

The approach taken by Australian courts contrasts with their counterparts in England and Wales. With all costs awarded in the leading case of *Cattanach v Melchior*, the Australian approach makes an interesting comparison between the leading views in wrongful conception.[103]

1 Cattanach v Melchior

Ms Melchior underwent a negligently performed sterilisation operation and later gave birth to a healthy child.[104] In a four to three split decision, the Court held in favour of the recovery of upbringing costs on all ordinary principles of negligence. The majority held that the claim did not hold the value of human life in contention.[105] The expression "wrongful" in wrongful conception was misleading as what was wrongful was not the child but rather the doctor's negligence.[106] Policy considerations — or "personal religious beliefs" or "moral assessments" disguised as policy considerations[107] — thus lost ground. Only general tort and negligence principles were relevant and accordingly, upbringing costs were recoverable. Any benefits derived from parenthood were "not legally relevant",[108] and the differentiation between children born with and without disabilities is "arbitrary and therefore unacceptable as a statement of the common law".[109] It was further held that the loss of reproductive autonomy warrants a subjective approach as the degree of harm varies from claimant to claimant.[110]

On the face of it, *Cattanach* provides the most satisfying outcome to date from a feminist perspective. The Court not only acknowledged the first step, that wrongful conception is a violation of reproductive autonomy, but made

102 Davies, above n 6, at 16.
103 *Cattanach*, above n 55.
104 Above n 55.
105 At [6].
106 At [68].
107 At [137].
108 At [90].
109 At [163].
110 At [112].

it a central part of the judgment. By awarding child-rearing costs, the Court provided Ms Melchior with a way to limit the negligent interference with her reproductive autonomy. In doing so, the Court engaged in an active effort to return the claimant to the position she was in prior to the violation of her reproductive autonomy.

(a) McFarlane *Politics*

Although a much needed departure from the path taken in *McFarlane*, which was found to lead "away from established legal principle",[111] *Cattanach* was a short-lived victory from a feminist perspective. Queensland, South Australia and New South Wales rushed to bar the progress made by the common law by passing legislation restricting the new rights awarded to parents in this area.[112] As a result, *Cattanach* fell short of being the groundbreaking judicial defence of reproductive autonomy. The "politics" of *McFarlane* were clearly reflected in the minority judgments as the desire to resurrect traditional family ideals[113] was made clear by references to "sacred" parental duties[114] and the need to recognise "the family as the natural and fundamental group unit in society".[115] These arguments from the minority reveal that conservative and traditional views remain strong in Australia, and were largely unaddressed by the majority, whose finding, once deconstructed, was simply that a claim for rearing costs did not upset the conservative family ideal portrayed by the minority and the House of Lords in *McFarlane*.[116] A fully argued case by the majority highlighting the need to take a feminist perspective on issues of reproductive autonomy would have better affirmed reproductive rights in Australia, and undone the outdated and discriminatory nature of the minority's arguments.

111 At [166].

112 Ben Golder "From *McFarlane* to *Melchior* and beyond: Love, sex, money and commodification in the Anglo-Australian law of torts" (2004) 12 TLJ 128 at 148 and 154. In Queensland and South Australia, the Civil Liability Acts 2003 (Queensland) and 1936 (South Australia) prevent the recovery of any "ordinary" costs associated with rearing a child (see respectively ss 49A, 49B and 67). In New South Wales, such recovery is limited to the costs associated with a child's disability (Civil Liability Act 2002 (NSW) subss 71(1)(a) and (2)).

113 Golder, above n 113, at 130 and 143.

114 *Cattanach*, above n 55, at [330].

115 At [35].

116 At [76]. See also Golder, above n 113, at 148: arguably only Justice Kirby's judgment engaged with the minority arguments in a meaningful way. Golder comments that this judgment, in the context of the accompanying rulings, reads more like a dissent than a lead judgment.

(b) A Substantive Approach to Reproductive Rights

The award of child-rearing costs, although necessary, is not sufficient to defend and protect claimants' reproductive rights and autonomy. Ben Golder identifies two political and legal approaches to reproductive autonomy.[117] The minimalist approach refers to the absence of legal barriers to and controls on a woman's ability to freely decide and act upon matters concerning her body and reproductive life.[118] In contrast, the substantive approach covers:[119]

> …the positive obligation to ensure safe and affordable access to sterilisation or contraceptive procedures, to provide financial and social support to primary caregivers, or to make appropriate redress when a woman's reproductive interests are infringed.

The same applies to men's reproductive rights and autonomy. Golder argues that liberal states have greatly taken a minimalist approach to the protection of women's reproductive rights.[120] A feminist approach would suggest that only a substantive approach can adequately recognise the effect of reproduction on individuals', particularly women's, participation in social, political and economic life.[121]

The reality of women's roles in the gendered domestic economy, as outlined at the outset of this article, warrants a substantive feminist approach. It is clear that the conservative, policy-laden denial of rearing costs in *McFarlane* was only narrowly avoided in *Cattanach*.[122] Easily overpowered by judges' personal experiences, values and perspectives, the common law's ability to articulate feminist legal theory to date has been weak, often as a result of "the absence – or at least shortage – of real feminist judges".[123] The lack of feminist legal perspectives in wrongful conception cases explains the continuing delay in recognising the full scope and nature of the harm: [124]

> The way in which a judge tells the story that led to a court case has the effect of solidifying the particular narrative adopted by the judge. If the judge

117 Golder, above n 113.
118 At 150.
119 At 150.
120 At 150.
121 At 150.
122 At 154.
123 McDonald and others, above n 25, at 25.
124 At 35.

> ignores certain details deemed to be legally irrelevant, those details are lost from the story. The way in which a judge constructs and interprets the facts of a case becomes a legal 'truth'.

From England's *McFarlane* to *Cattanach* in Australia, although flawed and discriminatory precedents have continued to build upon one another at the expense of established legal principle, these cases present to Aotearoa which factors should be considered and how they should be applied in different cases. They further make clear that, in the context of wrongful conception where harm is so gendered and yet both women and men suffer from interferences to their reproductive autonomy, a fully feminist approach is critical to the fair, just and reasonable outcome of wrongful conception claims.

IV CHILD-REARING COSTS IN AOTEAROA

New Zealand's approach brings a third twist in the way wrongful conception claims are addressed, as Aotearoa has strayed from the common law to pursue "community responsibility", "comprehensive entitlement", "complete rehabilitation", "real compensation" and "administrative efficiency",[125] guided by the Accident Compensation Act 2001 (the Act).[126] Despite not following a common law approach, the reasonings held in the case law from England and Wales, and Australia have influenced New Zealand courts in their interpretation of the Scheme's purpose and scope in wrongful conception. Before diving into New Zealand case law, Part IV will consider the purpose and history of the Act and will outline its gaps and limitations from a feminist perspective. It will then explain why addressing wrongful conception through the Act is a hindrance to the protection and promotion of reproductive rights in Aotearoa.

A The Accident Compensation Statutory Scheme

The Act provides compensation for victims of personal injury and was created as an alternative to the common law process, seen as uncertain, costly and slow.[127] It was devised according to three fronts of attack: prevention of personal injury, rehabilitation and compensation of victims.[128] "Personal injury" covers

125 A O Woodhouse, H L Bockett and G A Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967) [Woodhouse Report]. See also Davies, above n 6, at 24.

126 Accident Compensation Act 2001.

127 Woodhouse Report, above n 126, at 47.

128 At 19.

death, physical injuries, work-related mental injury, mental injury as a result of physical injuries or certain criminal acts, and damage to dentures and prostheses (other than wear and tear).[129] It does not include personal injury caused wholly or substantially by a gradual process unless work-related, caused by treatment or if the personal injury is consequential upon another personal injury already covered by the Act.[130] The main remedy under the Act is weekly compensation for lost earnings while the claimant is unable to work as a result of the injury, making the Act geared towards income-related compensation.[131]

A key feature of the legislation is its statutory bar: where the Act's provisions apply to a personal injury, any claim for damages at common law a claimant might otherwise have is barred to avoid overlap in compensation.[132] Compared with the UK and Australia, Aotearoa straddles statutory restrictions on the one hand and common law on the other, perhaps making its position the trickiest of all to navigate. Questions grappled with by the courts include whether the Act covers unwanted pregnancy, and if so, to what extent.[133] Importantly, does it cover the economic loss consequential upon the birth of the child, itself a consequence of the pregnancy?

B A Not-So-Universal Universal Scheme

The Woodhouse Report is the genesis of the Act and provides the foundations of the Scheme as it stands today.[134] Its focus on community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency more than suggests that the Act was intended to be all-embracing.[135] The Report speaks of a "total process" beginning at the outset of an injury and continuing "until everything has been done to achieve maximum social and economic independence."[136] It also discards the idea of a medical cap on coverage, stating that "success will depend upon an overall assessment which often may not be possible by medical evaluation alone."[137] The Woodhouse principles seem reminiscent of feminist jurisprudence as they

129 Accident Compensation Act, s 26(1)(a)–26(1)(e).
130 Section 26(2).
131 Schedule 1 and s 47.
132 Section 317.
133 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425.
134 Woodhouse Report, above n 126.
135 At 20.
136 At 141.
137 At 141.

aim for a fair and inclusive scheme by recognising the diversity of individual circumstances. The Act's purpose itself echoes the Woodhouse principles as it aims to provide a "fair and sustainable scheme" geared towards minimising both the incidence of injury in the community and its impact on the community, including "economic, social, and personal costs."[138] Its primary focus is stated as being the rehabilitation of the claimant, by "[restoring] to the maximum practicable extent a claimant's health, independence, and participation."[139] A reading of these provisions and the Woodhouse Report suggest that wrongful conception may well fall under the Act's scope, and that compensation for wrongful conception should be fully awarded and therefore include child-rearing costs.

A brief glance at New Zealand case law on wrongful conception indicates that the Act's application has drifted from the original ideas of maximum inclusion and full rehabilitation. Equally unable to avoid the policy issues with which the UK and Australia have had to grapple, New Zealand's statutory scheme has been somewhat of "a political football" in the context of wrongful conception.[140] The Scheme was intended to be a "temporary staging post on the road to universality",[141] but concerns over the "unacceptable and unsustainable" growing costs of the Scheme triggered legislative changes in 1992.[142] These changes marked the beginning of a consistent undermining of the original Woodhouse principles.[143] The growing costs of the Scheme were thought to have been caused by the courts' overly generous interpretation of "personal injury by accident".[144] The Accident Rehabilitation and Compensation Insurance Act 1992 (NZ) was enacted with new definitions which were exhaustive in nature and intended to reduce the statutory scope.[145] The key concept of personal injury was redefined as "death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical

138 Accident Compensation Act, s 3.

139 Section 3(c).

140 Rosemary Tobin "Wrongful Birth in New Zealand" (2005) 12 JLM 294 at 295.

141 Ken Oliphant "Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues" (2004) 35 VUWLR 915 at 917.

142 Joanna Manning "Plus ça change, plus c'est la même chose: Negligence and treatment injury in New Zealand's accident compensation scheme" (2014) 14 Med. L. Int. 22. at 26–27.

143 Briana Walley "Wrongful birth or wrongful law: A critical analysis of the availability of child-rearing costs after failed sterilisation operations in New Zealand" (2018) 24 Canta LR 1 at 29. Further legislative amendments were carried out in 2005.

144 Manning, above n 143, at 26–27.

145 Tobin, above n 141, at 299.

injuries", narrowly confining personal injury to physical and mental injuries only.[146] Despite the enactment of the latest Act in 2001, the definition of personal injury has remained largely unchanged.[147] These changes radically altered the focus of the Act and made it difficult for courts to interpret the Act in ways that provided cover.

Prior to the 1992 amendments, Louise Delany wrote a feminist assessment of the proposed changes, and argued that they would shift the foundation of the Act from one of "community responsibility" and "comprehensive entitlement" to one based on the concept of insurance.[148] Gender implications were evident in that, upon the new basis of the Act, those who contributed directly and financially to the Act were those who would benefit from it, thereby excluding the ones who contributed to society in other ways, such as through childcare and other invisible domestic activities.[149] As is the case today, these activities were primarily undertaken by women, and the proposed changes would put them at a greater socio-economic disadvantage.[150] It is therefore reasonable to assume that greater gender inequality is in fact one of the many consequences of the 1992 legislative amendments, a conclusion made evident by courts' subsequent limited ability to apply the Act in a feminist way.

C Child-Rearing Costs under the Act: to Award or Not to Award?

There are a multitude of injuries to which the Act may apply, but how it applies in a wrongful conception context may not be obvious at first glance. An unwanted pregnancy could be covered by the Act if it is a personal injury by "accident" or "treatment injury".[151] "Accident" is defined as a specific event or series of events other than a gradual process involving an application of force or resistance to the body.[152] "Treatment injury" replaced "medical misadventure" in 2005 as the latter was difficult to reconcile with the no-fault basis of the Act. Personal injury by "medical misadventure" was defined as personal injury by "medical error" or "medical mishap",[153] where "medical error" referred to

146 Accident Rehabilitation and Compensation Insurance Act 1992 (NZ), s 4(1).

147 Accident Rehabilitation and Compensation Insurance Act 1992 (NZ); and Tobin, above n 141, at 300. The Accident Insurance Act 1998 (NZ) later added sprains and strains by way of examples (s 29(1)(b)).

148 Louise Delany "Accident Rehabilitation and Compensation Bill: A Feminist Assessment" (1992) 22 VUWLR 79 at 91.

149 At 91.

150 At 98 and 100.

151 Todd "Accidental Conception and Accident Compensation", above n 38, at 198.

152 Accident Compensation Act, s 25(1)(a)(i).

153 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 32(1)(b) – repealed in 2005.

medical negligence. "Treatment injury" is defined as a personal injury suffered by someone seeking treatment or receiving treatment from one or more registered health practitioners that is caused by the treatment and is not an ordinary consequence of said treatment.[154] The substitution did not entirely remove the element of fault in the Act, and as a result, the concepts of "mishap" and "error" (and therefore negligence) remain relevant when determining cover.[155] Accordingly, common law concepts and principles found in the UK and Australian wrongful conception cases continue to apply in Aotearoa, such as those concerning whether there is a duty of care, whether it was breached and resulted in loss or harm to the claimant.

Case law in Aotearoa has been divided as to whether unwanted pregnancy resulting from a failed sterilisation amounts to a "personal injury". As a result of the restrictive 1992 amendments, cover for wrongful conception was consistently denied until the landmark case of *Allenby v H*.[156] After becoming pregnant due to a negligently-performed sterilisation operation, H suffered mental illness, which the Supreme Court unanimously held to be a personal injury under the Act. The term "personal injury" was to be used expansively.[157] Pregnancy, whether it was wanted or not, caused significant changes to a woman's body and was the source of pain and suffering.[158] Cover for wrongful conception did not unreasonably stretch the statutory language: a disease or infection, like pregnancy, grows in the body as part of a biological process, and if a disease or infection resulting from medical negligence could be classified as a personal injury under the Act, pregnancy with the same cause cannot reasonably be excluded from cover.[159] Statutory cover would further avoid the difficult assessment of damages under common law, as experienced by overseas jurisdictions.[160] The Court was able to use the Act to recognise that there was an interference with bodily integrity.[161] Pregnancy in wrongful conception then became a "personal injury" by "treatment injury". *Allenby,* however, did not involve or consider child-rearing costs.

154 Accident Compensation Act, s 32(1).
155 Todd "Accidental Conception and Accident Compensation", above n 38, at 199.
156 *Allenby v H*, above n 41. See also Tobin, above n 141, at 301.
157 *Allenby*, above n 41, at [68].
158 At [80].
159 At [80].
160 At [77].
161 Davies, above n 6, at 29.

In the next landmark case, *J v ACC*,[162] J became pregnant following a negligently performed sterilisation operation. The High Court applied *Allenby* and J received statutory compensation for the pain and suffering associated with the pregnancy and childbirth.[163] The question then became whether she was also entitled to weekly compensation for lost earnings arising from her responsibility to look after the child which prevented her from resuming work. The High Court needed to interpret s 103(2) of the Act in the context of wrongful conception, which states that the claimant must be unable to return to their previous employment because of the personal injury.[164] The High Court denied this part of the claim on the basis that it could no longer be said that J still suffered from a personal injury as she had physically recovered.[165] A Court of Appeal majority upheld the High Court's decision.[166] Medical assessments being a core indicator of whether a claimant was eligible for weekly earnings-related compensation, J could not be said to still be suffering from the personal injury as she had fully recovered from her pregnancy.[167] J's inability to work therefore was no longer because of the pregnancy, but due to "the existence of a child following her pregnancy".[168] To allow weekly compensation in J's case would go "beyond what is contemplated by the Act".[169]

President Kós disagreed with the majority, arguing that J was entitled to weekly compensation for loss of earnings for as long as her need to care for the child prevented her from re-entering the workforce.[170] His reasoning echoed the majority judgment in *Cattanach*, whereby the personal injury was the unwanted pregnancy; the child being a natural consequence of the injury, so too was the need to care for the child.[171] Coupled with the need to interpret the Act in a "generous and unniggardly" manner (a view which the majority

162 *J v ACC*, above n 41.
163 *Accident Compensation Corporation v J* [2016] NZHC 1683, [2016] 3 NZLR 551.
164 Accident Compensation Act, s 103(2).
165 *Accident Compensation Corporation v J*, above n 164, at 26.
166 *J v ACC*, above n 41.
167 At [33].
168 *J v ACC*, above n 41, at [33].
169 At [33].
170 At [51].
171 At [51]; and *Cattanach*, above n 55, at [53], [67] and [68].

had initially affirmed but lost along the way),[172] this confirmed J's entitlement "as a simple matter of causation".[173]

Where Kós P's dissent reflects a clear and logical application of relevant legal principles, unencumbered by personal and social views, the same cannot be said of the majority decision. In line with Kós P's dissent, feminist jurisprudence offers an alternative and more inclusive interpretation of s 103(2). Echoing Lady Justice Hale's extra-judicial writings, the loss of earnings flows inexorably from the loss of autonomy involved in every unwanted pregnancy, which is different to considering them as consequential upon the physical aspects of the pregnancy.[174] The cause of J's inability to work accordingly continues to be her pregnancy. But for the personal injury, the mother would be able to work at full capacity. Unfairly, the father's incapacity becomes somewhat irrelevant as the restrictive definition of "personal injury" gives little room for negligently-performed vasectomies to be covered.

In addition, to conclusively say that a mother has fully recovered ten weeks after having given birth does not take into account biological factors that continue to affect women post-birth, including but not limited to extreme fatigue, post-natal depression, and healing from scars and tears.[175] Recovery varies greatly from woman to woman and certain symptoms may not be visible or widely understood.[176] A mother's inability to work extends beyond her physical and mental recovery, as a child is a direct and foreseeable consequence of the injury, with impacts on the claimant for the duration of her legal responsibility toward the child, that is at least 18 years. These consequences are not mitigated by parental leave payments for example, which are capped at below minimum wage in Aotearoa.[177] The costs of out-of-school care services are also a significant hindrance to parents seeking to re-enter the workforce, particularly in low to middle income households.[178] Since women are often the primary caregivers of infant children, these barriers to employment are almost exclusively faced

172 *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA) at 438; and *J v ACC*, above n 41, at [14].

173 *J v ACC*, above n 41, at [64].

174 Hale LJ, above n 54, at 763.

175 Anthea Williams "Wrongful Birth and Lost Wages: J v Accident Compensation Corp" (2018) 2 NZWLJ 295 at 303–304.

176 At 303.

177 Tara McAllister and others "Parity during parenthood: Comparing paid parental leave policies in Aotearoa/New Zealand's universities" (2021) 35 Women's Studies Journal 4 at 4.

178 Centre for Social Research and Evaluation *Out-of-school care services and aiding parents into work* (Ministry of Social Development, Evidence Brief, 2011) at 4.

by women.[179] A feminist analysis of the Act confirms that female claimants are effectively without any legal options to fully recover economic loss from wrongful conception.[180] To draw the line at weekly compensation for loss of earnings therefore goes against the Woodhouse principles underpinning the Act and limits its feminist application.

Since child-rearing costs are not included in the four types of compensation available to eligible claimants, a claim for such costs themselves would not be possible under the Act.[181] Such a claim would have to be under the guise of a claim for lost earnings, which, as discussed above, is unlikely to be successful.[182] The Act would accordingly provide the claimant with first week's compensation and a weekly compensation for loss of earnings for the duration of her inability to work.[183] If Kós P's position in *J v ACC* had been accepted, weekly compensation based off the income of the parent experiencing the most financial loss would have been appropriate. Given the ongoing gendered reality of parenthood, it would likely be the mother's income as she would be more likely to reduce her work hours or quit entirely. It could equally be the father's income but, as noted above, he could not be the claimant under the Act. If neither parent was in paid employment, weekly compensation could be based on the level of minimum wage at the time of the claim. If both parents had switched to part-time work and were experiencing the same level of financial loss, the difference between their incomes pre- and post-pregnancy and birth would be an appropriate basis for weekly compensation under the Act. As for the duration of the weekly compensation, as mentioned above, a parent's responsibility to raise a child legally ends once the child reaches the age of 18. Weekly compensation would need to be subject to changing circumstances over the years, for example in the case of a parent returning to full-time work. Eighteen years is a significant period of time, but merely reflects the reality of parenthood and is especially justified when becoming a parent is unplanned, unwanted and occurs as a result of a violation of reproductive rights.

Alone the scenario above would unintentionally broadcast the message that wrongful conception, although unfortunate, is blameless and fully fixable

179 Williams, above n 176, at 307.
180 At 307.
181 Todd "Accidental Conception and Accident Compensation", above n 38, at 204; and Accident Compensation Act, s 69.
182 Todd "Accidental Conception and Accident Compensation", above n 38, at 204.
183 Accident Compensation Act, s 69(1)(b)–69(1)(c).

with financial compensation. The fundamental harm in wrongful conception, being the loss of reproductive autonomy, therefore would continue to be unaccounted for. The consideration of a different outcome in *J v ACC* following Kós P's dissent shows that, due to their limited nature, remedies under the Act cannot accurately and sufficiently respond to wrongful conception, particularly in light of the Act's no-fault basis. An additional type of legal recognition, perhaps outside the Act, is therefore warranted.

D Aotearoa's Inadequate State of Affairs

1 The Issue of the Statutory Bar

J v ACC provides the closest example of how a child-rearing claim would be addressed in Aotearoa.[184] *J v ACC* limits the statutory scope to the physical aspects of the unwanted pregnancy and therefore prevents claims for any type of upbringing costs under the Act, problematic from a feminist perspective.[185] Could parents nonetheless have a claim for child-rearing costs at common law? Combined with the Act's cover, a common law claim has the potential to allow recognition of most if not all heads of damages identified with a feminist perspective, but whether the statutory bar applies will determine whether claimants are in fact able to receive maximum recognition. It is therefore crucial that no gaps exist between what is covered under the Act and what can be claimed under common law as claimants would otherwise be left without the opportunity to receive full remedy. This would be unacceptable from a feminist perspective as claimants in wrongful conception contexts would generally be women and not receiving appropriate compensation would result in greater disadvantage for them.

The possibility of a common law claim was alluded to by the majority in *J v ACC*.[186] Child-rearing costs would stem from the parent-child relationship rather than the pregnancy and remain a "separate and independent head of financial damage".[187] Such reasoning is difficult to follow from a feminist perspective as it disregards the impact of the negligent act as the source of harm, assuming that once the child is born, the claimant no longer suffers harm and any economic loss becomes consequential upon the parental responsibilities.

184 *J v ACC*, above n 41.
185 Walley, above n 144, at 7.
186 *J v ACC*, above n 41, at [41].
187 Todd "Accidental Conception and Accident Compensation", above n 38, at 60.

Kós P disagreed. He left the issue unresolved but stated that the statutory bar was likely to apply to Ms J's situation.[188]

Kós P's view is difficult to repudiate when looking at the wording of s 317. The provision forbids any proceeding "for damages arising *directly or indirectly* out of (a) personal injury covered by this Act; or (b) personal injury covered by the former Acts".[189] The words "directly or indirectly" significantly broaden the scope of the bar.[190] Unwanted pregnancy is a personal injury.[191] The economic loss flows inexorably from the pregnancy, which in this case is the personal injury. Child-rearing costs therefore arise "indirectly" out of a personal injury already covered by the Act. A clear and objective reading of s 317 indicates that a common law claim for the recovery of child-rearing costs in wrongful conception is likely to be barred.

2 The "Legal Black Hole"

If a claimant cannot recover child-rearing costs under the Act or common law due to the statutory bar, how can their loss of reproductive autonomy ever be adequately recognised? Over the years, legislative amendments and their interpretation by New Zealand courts have created a "legal black hole" whereby the only recoverable costs are those associated with the pregnancy and childbirth, with no further opportunity for parents to claim other costs stemming from wrongful conception, such as child-rearing costs.[192] Statutory compensation could never match damages at common law.[193] Along with the no-fault element of the Scheme, compensation could only ever be a measure of contribution to the injured claimant's loss.[194] Not only is statutory compensation an inadequate mechanism through which wrongful conception is currently addressed, it also curtails parents' ability to seek other courses of remedy.

From a feminist perspective, the award of child-rearing costs is only a start in recognising the permanent consequences of wrongful conception.

188 *J v ACC*, above n 41, at [70] per Kós P.
189 Accident Compensation Act 2001, s 317(1) (emphasis added).
190 Richard Flinn "Failed sterilisations: a "resurgence of common law claims" for loss of income?" (October 17 2017) Wotton Kearny Knowledge Hub <www.wottonkearney.com.au/> .
191 *Allenby*, above n 41.
192 Walley, above n 144, at 2.
193 Manning, above n 143, at 22.
194 At 22. Compensation paid periodically over the claimant's lifetime can however amount to significant sums.

As discussed above, other common law options would include vindicatory damages. Such damages would stray from the commonly-held view that tort law is primarily compensatory and would operate as a secondary function to compensation.[195] It is nonetheless difficult to ignore the clear language of s 317 of the Act, which more than suggests that the statutory bar would also extend to vindicatory damages. While the common law seems to offer the most potential in terms of compensation and vindication, the statutory bar prevents any claim from being made — a concerning point from a feminist perspective given the Act's already inadequate cover.

Perhaps the "legal black hole" may be addressed through other means, such as the Health and Disability Commissioner. The Health and Disability Commissioner Act 1994 (HDCA) was enacted with a view to "promote and protect the rights of health consumers and disability services consumers" and provide a complaints mechanism designed to facilitate the "fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights".[196] The Commissioner may accordingly identify and address fault under professional liability standards which cannot be considered under the Act due to its no-fault basis. Any person may complain to the Commissioner if they believe a healthcare provider has breached a right contained in the Health and Disability Commissioner Code of Rights.[197] If the Commissioner is satisfied a right has been breached, the complaint may be referred to the Director of Proceedings, who may then decide whether to instigate proceedings under the Human Rights Review Tribunal.[198] If the Commissioner does not refer the matter to the Director of Proceedings, or if the latter does not instigate proceedings under the Tribunal, the complainant may instigate proceedings under the Tribunal themselves.[199]

There are however a number of limitations with this mechanism, which, considering wrongful conception through a feminist lens, indicate that the Health and Disability Commissioner would only partly address the "legal

195 Section 6.

196 Section 6.

197 Anna Christie "Vindicating Reproductive Autonomy in Wrongful Conception Cases" (2020) 26 Auckland U L Rev 178, at 208: in the context of wrongful conception, the relevant rights in the Code would likely be rights 4(1) (the right to have services provided with reasonable care and skill) and 6(1) (the right to receive information that a reasonable consumer in that consumer's circumstances would expect to receive).

198 Health and Disability Commissioner Act 1994, ss 45(2)(f) and 50.

199 Section 51.

black hole" and only in specific circumstances. First, only the person whose rights have been breached may instigate proceedings, excluding secondary victims, such as the complainant's partner, from being part of the process.[200] Second, s 52(2) of the HDCA imposes a statutory bar on claims which can be covered by the Act.[201] This means that, even in the case of a negligently performed vasectomy where the complainant to the Commissioner could only be the father, as his partner would not have received any medical treatment on which to base the claim, the father's claim still could not stand as a statutory bar would apply here too. Even so, having to bring two separate claims under two separate bodies would involve greater time and financial expenses. A more streamline process would surely be warranted. These limitations suggest there is little to be gained by utilising the Health and Disability Commissioner in a wrongful conception context.[202] Having to rely on the Health and Disability Commissioner to fill the "legal black hole" in wrongful conception therefore does not provide the solutions required from a feminist perspective as parents continue to struggle for adequate recognition of their harms.

Despite its intricate accident compensation scheme, Aotearoa is no more advanced than its British and Australian counterparts, taking restrictive approaches to wrongful conception as a result of policy concerns. Parents are unable to receive an accurate recognition of the harms suffered, whether under the Act or common law. A feminist view of wrongful conception in Aotearoa suggests that maintaining the status quo of statutory interpretation will not clarify the law, nor will the Act, in its current form, resolve the social policy difficulty of whether to include or exclude child-rearing costs in awarded compensation. If nothing changes, the reproductive rights of parents, mothers in particular, will continue to be violated, and New Zealand law will continue to compound patterns of hardship affecting persons suffering from pre-existing disadvantage and discrimination.

V SOLUTIONS

Feminist jurisprudence suggests an urgent review of Aotearoa's current approach to wrongful conception is warranted. Two options present themselves: either the Act is expanded to include child-rearing costs or the scope of the

200 *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [47] in Christie, above n 200, at 208.

201 Health and Disability Commissioner Act 1994, s 52(2).

202 Christie, above n 200, at 208.

statutory bar is readjusted to allow claims for child-rearing costs at common law. Part V explores how each option would operate in theory and explains why the latter is preferable from a feminist perspective.

A Amending the Act and Reproductive Autonomy Within the Scheme

To allow full statutory cover in wrongful conception would certainly simplify things in Aotearoa, as the polarising matter would not need to be settled at common law.[203] Indeed, courts may not be the appropriate arbiter to resolve this issue for Aotearoa.[204] They would need to grapple with inevitable policy and moral considerations, as was the courts' experiences in both the UK and Australia, leading to much confusion and inconsistencies.[205] Parliament, for its part, is the most appropriate socially representative body to explore solutions to the difficulties in wrongful conception cases.[206] As mentioned earlier, it has the authority to make value judgments the courts cannot justify.[207] Furthermore, leaving wrongful conception claims to the courts would be contrary to New Zealand's current approach, given that personal injury litigation is largely barred.[208] Common law claims can also be time and cost intensive and may therefore be unaffordable for vulnerable claimants. Recentring the Act around the Woodhouse principles would allow for more generous interpretations of the Act, making lost earnings easier to recover. Amending the Act in this way would be a definitive step towards the creation of a universal and comprehensive injury compensation scheme, as originally intended.[209] It would spare claimants and medical professionals alike of the time and costs of litigation, without leading to excessive and unmanageable costs spent under the Act.[210] Any cost or floodgate-related concern would be an issue for Parliament to resolve.[211]

Amending s 103(2) would be the key focus as currently, a claimant may only gain cover if they are unable to work because of the personal injury.

203 Tobin, above n 141, at 304.
204 Walley, above n 144.
205 At 27.
206 At 28.
207 At 28.
208 At 28.
209 At 28.
210 At 28 and 31.
211 At 32.

The claimant's inability to work would generally last the first few years of the child's life. Once the child is old enough for preschool, the claimant would be considered able to enter or re-enter the workforce. They would then likely lose their entitlement for compensation under the Act even if they choose not to work, or not as much, in order to continue caring for the child. From a feminist perspective, this aspect of the Act ignores the gendered social norms that continue to prevail today as the skewed reality of parenthood and caregiving means that women are more likely to find themselves disproportionately impacted in the medium to long term. Kós P's interpretation of s 103(2) in *J v ACC* focuses on the claimant's incapacity rather than injury and allows for the consideration of individual realities. The claimant may have fully healed from the injury, but remains incapacitated and unable to work due to childcare realities, which flow from the personal injury. This way of viewing the injury's flow on effects aligns with a feminist interpretation and the Woodhouse ideals of universality, complete rehabilitation and comprehensive entitlement. Section 103(2) should therefore be amended to focus on incapacity arising from injury rather than injury itself. Child-rearing costs would also need to expressly become a type of entitlement available under the Act, as a claim for lost earnings alone likely would not cover the range of expenses required for parents to raise a child.

Parliament has shown signs of willingness to consider gendered matters through the recent Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022 (the Amendment Act). As its name indicates, the Amendment Act primarily extends coverage of the Act to maternal birth injuries, providing greater cover and certainty for claimants and improving equitable access to the Scheme. The Amendment Act is a step towards greater recognition of gendered personal injuries and will play a crucial role in assisting the 80 percent of birthing parents who experience injury during labour or childbirth.[212] It also raises the possibility of additional gender-related amendments to the Act in the future, perhaps further aligning the Scheme with the Woodhouse principles and moving closer to easier and more complete wrongful conception coverage. At this stage, the Amendment Act is not a full answer to wrongful conception. The list of covered maternal birth injuries is definite, thereby excluding the full range of injuries that may be suffered.[213]

212 Accident Compensation Corporation "Maternal Birth Injuries" ACC <www.acc.co.nz>.

213 Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022, sch 2.

Even with further amendments focused on wrongful conception, the no-fault basis of the Act continues to hinder recognition of the loss experienced with wrongful conception. Only extending coverage in 2022 without allowing retrospective claims further ignores women who have previously suffered maternal birth injuries which continue to impact them.[214] Given the current $1 billion annual pay-out difference between men and women by the Accident Compensation Corporation, the decision to not allow retrospective coverage shows a lack of willingness from Parliament to fully respond to claims and address gender inequity inherent in the Scheme.[215]

However, it is doubtful the suggested amendments would significantly improve the Act. Due to the gendered nature of wrongful conception, only women may claim under the Act as men do not suffer from a personal injury under it. Fathers who become the primary carers of their child therefore cannot be compensated unless the Act is extended to partners of those who have suffered a personal injury, which would broaden the scope beyond the purpose of the Act even in light of the Woodhouse principles, as its focus is on rehabilitating those directly suffering from a personal injury. Although feminist jurisprudence typically focuses on women's perspectives and stories, it ultimately seeks to shed light where few are looking and is wary of creating new patterns of discrimination. It is discriminatory towards fathers for the Act to be the only mechanism through which wrongful conception can be addressed in New Zealand. To only make the amendments suggested above would discount half of Aotearoa's population as potential claimants. For men who are affected by wrongful conception to have their circumstances recognised, loss of reproductive autonomy would need to become a personal injury under the Act. Including negligently performed vasectomies alone would not suffice as fathers who did not undergo such operations would be invisible. The definition of personal injury, currently restrictive, would need to be modified so as to expressly include loss of reproductive autonomy.

Two key issues remain even if all the aforementioned amendments are made. First, entitlements under the Act are not intended to fully compensate claimants.[216] Weekly compensation for lost earnings is capped at 80 percent of

214 Education and Workforce Committee *Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill* (28 June 2022) at 6.

215 At 6.

216 Manning, above n 143, at 22.

the claimant's weekly earnings.[217] Unless the cap is removed, a claimant can never receive compensation which accurately reflects their position. Second, the element of the medical practitioner's negligence differentiates wrongful conception from other injuries under the Act. Here, a wrong has been suffered, as opposed to an everyday fall for example.[218] Under a feminist lens, a blanket approach to wrongful conception ignores individual circumstances and somewhat silences those who have suffered harm. Although the Woodhouse report aims for an all-encompassing and comprehensive scheme, key elements of a wrongful conception claim require particular consideration and fuller recognition, mainly the loss of reproductive autonomy. The first point of consideration under the Act is the personal injury. Due to the Act's no-fault basis, the source of harm is ignored, but that is exactly what renders a wrongful conception claim so unique. Where negligence is established, resulting in the violation of one's fundamental right to reproductive autonomy, justice would dictate that some form of accountability be met, such that doctors are expected and required to perform as per recognised professional standards. Vindicatory damages under the common law aim to mark that a wrong was suffered rather than to compensate the claimants for it.[219] Awarded in *Rees* as a conventional lump sum, vindicatory damages have the potential to accurately identify the harms suffered in wrongful conception and therefore allow claimants to feel seen and heard. Subject to discretionary adjustments in line with feminist jurisprudence to reflect each claimant's individual circumstances, vindicatory damages would provide a closer recognition of the loss of reproductive autonomy in wrongful conception and acknowledge the fundamental point that a wrong has been suffered by the claimant. Such damages would also serve as a projection of public disapproval of medical negligence and reaffirm professional medical standards.[220] Whether a loss of reproductive autonomy can ever be adequately recognised is doubtful but, through their different purposes, common law damages allow for better accuracy and scope of damages to address the harms suffered. The question

217 Accident Compensation Act, sch 1, s 47(2).

218 It is important to note that the Scheme is able to cover personal injuries caused by other forms of injustice: pregnancy resulting from rape, for example. However, the harm in these cases is adequately recognised under s 128B of the Crimes Act 1961, which criminalises rape. There is no such recognition of the violation of rights in wrongful conception under the Act.

219 David Neild "Vindicatory Damages in the Child Welfare Tort Cases" (LLM Thesis, Victoria University of Wellington, 2011) at 54; Christie, above n 200, at 191-192.

220 Christie, above n 200, at 179 and 210.

of whether the statutory bar prevents the use of vindicatory damages to complement statutory remedies in wrongful conception then arises. This is more fully discussed below.

New Zealand has an advantage over other jurisdictions given the existing framework of the Act. It is nonetheless difficult to avoid the conclusion that the Act, by nature, cannot fully and accurately recognise the impact and scope of the wrong suffered in wrongful conception. Additionally, the suggested amendments would require significantly shifting the Act's focus back in line with the original Woodhouse principles, which have long been abandoned.

B A Possible Return to Common Law Claims

Wrongful conception claims at common law have the greatest potential in terms of accurate recognition of the harms suffered and awarding the full range of available damages. Looking at the history of the Act and the related case law, the statutory bar would have started applying to wrongful conception claims once pregnancy became a personal injury under the legislation. Logically, overturning *Allenby* would rescind the bar and restore the possibility of bringing forward a claim at common law.[221] An element of uncertainty would remain given the lack of consistency in this area of law, as shown through the UK and Australian examples. Considering Aotearoa's progressive approach to torts, Kós P thought it highly probable that the Australian approach would be followed as the full award of costs best reflects the values of contemporary New Zealand society.[222] Bringing back common law claims may have a floodgate effect on medical negligence claims more broadly. However, should this occur, it would be Parliament's role to pass legislation limiting the common law exception to wrongful conception. This line-drawing would not be arbitrary as the unique nature of wrongful conception sufficiently warrants special treatment. Parliament could impose a deadline by which a claim must be brought, or if absolutely necessary, go to the extent of excluding retrospective claims. Although detrimental to those having already suffered from wrongful conception, this could be justified by focusing on the undeniable benefit to future parents in Aotearoa. Legislative coverage being clearly inadequate, the potential of allowing common law

221 Walley, above n 144, at 11.

222 *J v ACC*, above n 41, at [57] and [70].

claims outweighs that of guaranteed coverage of pregnancy and childbirth under the Act and is worth exploring from a feminist perspective.

The key issue with the common law is the quantification of damages, which the UK courts have amply struggled with. The only way a claimant can hope to return to close to their pre-wrongful conception position is by bringing forward three separate claims at common law based on the principles of negligence: the mother's for pregnancy and child birth, a second for child-rearing costs and a third for loss of reproductive autonomy (the latter two could be brought forward by individuals or jointly by couples).[223] Awarding a single conventional sum as in *Rees* would bring certainty and predictability, however, will always remain arbitrary.[224] In Stephen Todd's opinion, the best the courts can do is find a sum that is widely recognised as reasonably fair.[225] But through a feminist lens, the loss of or interference with reproductive autonomy cannot be compensated by financial means. Rather, what is needed is a staunch vocal acknowledgment of the injustice sustained by the claimant. Any arbitrary conventional sum would be an insult to reproductive rights.

Vindicatory damages therefore have their place in wrongful conception. Combined with compensatory damages focused on child-rearing expenses, vindicatory damages can accurately identify the harm suffered in wrongful conception and provide justice for claimants, both women and men. As discussed earlier, these should be discretionary and on a case-by-case basis. Since wrongful conception cases arise as a result of medical negligence with life changing consequences, vindicatory damages would likely already be justified in most if not all cases. It would be difficult to determine which individual circumstances warrant a higher or lower sum when every loss of reproductive autonomy is a serious breach of a human right. Factors that could limit the sum of vindicatory damages would likely include whether the medical practitioner has acknowledged and accepted their negligence and whether they have taken steps to ensure such negligence is not repeated in the future (by enrolling in refresher training courses for example, or taking a break from work). Some claimant(s) may not be interested in vindicatory damages at all.

223 Stephen Todd "Common Law Protection for Injury to a Person's Reproductive Autonomy" (2019) Law Quarterly Review 635 at 652.

224 At 652.

225 At 651.

Compensatory damages would also need to be discretionary, with set minimum figures relating to compensating the harm occurring in the pregnancy and childbirth which may be increased on a case-by-case basis (higher sums being warranted if complications arose during pregnancy or childbirth, or both, for instance). Based on national averages, child-rearing costs should not be reflective of the parents' financial position. Simply because a parent can afford to spend more on their child does not justify them receiving higher child-rearing damages than someone who cannot. Parents who may need more financial help as a result of disability for example, as in *Parkinson* and *Rees*, should be entitled to higher damages to reflect the reality of their needs. The purpose of compensatory damages here would be to give the parent(s) a financial head start for the new life they had not planned to have.

Perhaps most importantly, to ensure that common law wrongful conception claims have the best chance of being genuinely heard, considered and understood, the composition of courtrooms must be appropriate for the case in question. In other words, there must be a push towards a greater presence of women judges and counsel in courtrooms, particularly in wrongful conception cases where the nature of the claim is so uniquely gendered. Indeed, "[d]iversity of thought amongst those hearing the case and counsel appearing assists those present in asking the right questions and challenging the socio-political underpinnings of previous decisions".[226] Anthea Williams pointed out that all persons who heard the *J v ACC* case and counsel, bar one, were male, and "[p]erhaps this contributed to a missed opportunity for a more complete assessment of the effect of the injury (pregnancy and childbirth) to Ms J".[227] Whether a greater presence of women who had experienced pregnancy and childbirth in the courtroom would have led to a different outcome cannot be proven, but the gender make-up of courtrooms, in New Zealand and other jurisdictions, can no longer be ignored in 2024. This is not to say that feminist perspectives cannot be adopted by male judges and counsel, but for this lens to be more widely, accurately and actively utilised, courts in Aotearoa need to highlight women's stories and experiences by allowing them to present and hear these firsthand. Doing so would set up a conducive environment for wrongful conception claims to be adequately acknowledged and remedied.

226 Williams, above n 176, at 308.

227 At 304.

VI CONCLUSION

This article has explored the way in which wrongful conception cases are dealt with under Aotearoa New Zealand law using a feminist lens. In light of the disjointed approaches from other common law jurisdictions, it sought to investigate the impact of the Accident Compensation Act on wrongful conception claims. Feminist jurisprudence was used to establish that wrongful conception is in fact not an area of law that warrants a gender-neutral stance, counter to what many judicial decisions have suggested.

While Aotearoa's statutory scheme sets it apart from other common law jurisdictions, it is unlikely child-rearing costs in wrongful conception can be recovered under the Act. The statutory bar creates a legal black hole, whereby the claimant is prevented from fully recovering under the Act but barred from recovering under common law. Far from a mere technicality, it effectively prevents the adequate compensation and acknowledgment of significant harms suffered which have important socio-economic consequences.

Caregiving and parenting demographics remain highly gendered in Aotearoa and globally. Women are disproportionately affected by the burdens of parenthood yet less entitled to compensation under the Act due to their overwhelmingly invisible contributions to society. Despite evolving norms, there is a disconnect between increasingly egalitarian and progressive expectations and the reality of women's experiences. The Act does not take into account these imbalances and creates new patterns of discrimination as, despite also suffering from a loss of reproductive autonomy, men in wrongful conception cases are unable to recover under the Act at all. Given the overwhelming evidence of gender inequality in both the private and public spheres, the status quo is no longer tenable.

The Act may never have intended to discriminate but, in effect, wrongful conception claimants in Aotearoa can only hope to be fully compensated at common law. The no-fault basis of the Act prevents any recognition of the gendered nature of harm in wrongful conception, which includes but is not limited to the violation of the claimant's reproductive autonomy. Wrongful conception claims need the interpretive expertise of common law courts to recognise and appropriately compensate mothers and fathers.

Aotearoa needs to retract the statutory bar on wrongful conception by overturning *Allenby* and be able to draw up a new common law path with the benefit of hindsight from the UK and Australian case law. By ensuring greater

diversity of thought in courtrooms, judges will be able to more appropriately recognise the realities in which claims are grounded, inching Aotearoa closer to a fairer, kinder and more inclusive society. New Zealand's progressive state of law concerning torts and individual rights suggests that a staunch judicial defence of reproductive rights is much needed.

THE NEOLIBERAL EVOLUTION OF NEW ZEALAND'S TAX POLICY FOR FAMILIES WITH CHILDREN: IS IT REALLY WORKING FOR FAMILIES?

Christina Posner*

"If you can't afford your children to have breakfast, you're a bad budgeter. If you aren't working you're lazy. But our subconscious beliefs about some people 'deserving' poverty because of poor life choices no longer apply in today's environment."[1]

The 1980s era of neoliberal reforms in Aotearoa New Zealand catalysed a child poverty crisis. The movement towards market-oriented policy meant the Government reduced the highest rates of tax as well as spending on welfare. The perceived solution to poverty was instead, to work more. Tax relief schemes that were previously designed to support children in low-income families were amended to focus on rewarding self-sufficient caregivers. Unfortunately, the percentage of children living in poverty doubled since these changes were made in the 1980s. Despite these statistics, law makers continue to tie work incentives to child poverty alleviation efforts. In doing so, the tax system currently prioritises children in the families that are considered to be productive in the economy. This collaterally punishes the children whose caregivers are unable to sufficiently provide for them. This article analyses the harm caused by disadvantaging the worst-off families in the hopes of driving market led child poverty reduction. Evaluation of the current tax relief package for families shows that, while it strives for both income-adequacy and incentivisation of paid work, it does not adequately achieve either.

* BCom/LLB (Hons) graduate from Waipapa Taumata Rau, University of Auckland. The author wishes to thank Professor Michael Littlewood for providing her with the opportunity to explore this aspect of tax policy in New Zealand, and for his guidance during the writing process.

1 Vivien Maidaborn, interviewed in Eleanor Ainge Roy "New Zealand's most shameful secret: 'We have normalised child poverty'" *The Guardian* (online ed, London, 16 August 2016).

I INTRODUCTION

The statement that no child in Aotearoa New Zealand should go hungry is uncontroversial.[2] Despite this, New Zealand's inadequate tax policy for families with children contributes to ongoing child poverty across the country. More than one in four New Zealand children live in poverty, on a measure of the percentage of children living in households with less than 60 percent of the median disposable income after deducting housing costs.[3] A progressive income tax system, such as New Zealand's, aims to reduce income inequality. In April 2022, the Hon David Parker, Minister of Revenue, stated that, in the context of tax principles, fairness is the "most core value of New Zealand" and "an important objective of taxes is to redistribute income".[4] It follows that tax policy for families with children should strive to achieve these redistributive aims throughout the wider tax system. Mr Parker suggested that "[m]ost of us want the vulnerable protected from poverty, because we believe this is morally the proper thing to do."[5] However, New Zealand's high child poverty rate attests that the current tax relief package for families with children — Working for Families (WFF) — does not adequately contemplate these aims.

WFF is the result of a dogged commitment to the neoliberal agenda that the Hon Sir Roger Douglas pursued in the 1980s as Minister of Finance.[6] The economic and social changes that occurred during this period represented a departure from the egalitarian society in which New Zealand once took pride. Instead, caregivers raising their children in severe poverty — in particular, mothers — were increasingly seen as lacking self-responsibility and as a drain on taxpayer money.[7] Reflecting this attitude, benefit payments and tax relief

2 See for example the survey results in David Reynolds and Miranda Mirosa "Understandings of Food Insecurity in Aotearoa New Zealand: Considering Practitioners' Perspectives in a Neoliberal Context Using Q Methodology" (2022) 14 Sustainability 1 at 11.

3 Stats NZ "Child poverty statistics: Year ended June 2022" (23 March 2023) <www.stats.govt.nz>. The measure described is used to reflect trends in the housing market, including housing inflation, and is a common measure of poverty among developed countries. See Jonathan Boston "Child Poverty in New Zealand: Why it matters and how it can be reduced" (paper presented to Children in Crisis Conference, Hamilton, 7–9 October 2012) at 3.

4 David Parker, Minister of Revenue of New Zealand "Shining a light on unfairness in our tax system" (speech to Te Herenga Waka—Victoria University of Wellington, Wellington, 26 April 2022).

5 Parker, above n 4.

6 Peter Aimer "Labour Party – Fourth, fifth and sixth Labour governments" (20 June 2012) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

7 See for example the comments reported in Celeste Gorrell Anstiss "WINZ data reveals big families mean big benefits" *Otago Daily Times* (online ed, Dunedin, 15 July 2012).

for those on low incomes underwent significant cuts.[8] As a result, the rate of child poverty in non-working households increased from 20 percent in the late 1980s to nearly 80 percent in the 1990s.[9]

Parliament enacted WFF in 2004 as an alleviation effort.[10] When the Future Directions (Working for Families) Bill 2004 was first brought to Parliament, its specified objectives were to incentivise work and help families achieve income adequacy.[11] WFF is a package of four tax credit schemes that alleviate some of the tax burden for qualifying families. However, two of the four WFF schemes are withheld from beneficiary families, as an incentive for those families to increase their work hours.[12] The scheme disproportionately affects women, who make up around 80 percent of sole parents,[13] and who therefore are more likely to find it hard to return to work and consequently rely on social welfare benefits. By discriminating against beneficiaries, schemes enacted to alleviate child poverty leave the most disadvantaged women and children worse off.

The five parts of this article argue that current New Zealand tax policy for families with children is inequitable, inefficient and discriminatory, each factor contributing to the failure of WFF's objectives:

i) Part II will explain preliminary matters: first, the tax treatment of benefit income in New Zealand and second, the current child poverty setting, the lens through which this article should be read.

ii) Part III provides a brief history of New Zealand's tax policy for families with children. It will explain how the free-market economic reforms of the 1980s altered the tax and welfare interface of a country once considered a "model welfare state".[14] Whilst the earliest forms of family support policies in New Zealand were intended to protect women and children,

8 Brian Easton "Economic and Other Ideas Behind the New Zealand Reforms" (1994) 10(3) Oxf Rev Econ Policy 78 at 87–89.

9 Measured as the percentage of children in households with less than 60 percent of median household income after housing costs: Boston, above n 3, at 2.

10 Taxation (Working for Families) Act 2004.

11 (27 May 2004) 617 NZPD 13424.

12 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [26]–[30].

13 Stats NZ "Wellbeing outcomes worse for sole parents" (14 September 2020) <www.stats.govt.nz>.

14 Maureen Baker and Rosemary Du Plessis "Family welfare – A model welfare state, 1946–1969" (29 June 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

modern policy instead treats low-income mothers as a burden on taxpayers and the government purse.

iii) Part IV will analyse the inequities, inefficiencies and discrimination within the current WFF package. As two major relief schemes in this package are withheld from beneficiaries, inequity arises whereby the poorest families contribute a greater proportion of their income to the tax yield than families who are better off. WFF is also inefficient as the package creates high effective marginal tax rates (EMTRs) for some families.[15] At certain levels of income, WFF disincentivises families from working more hours.[16] WFF is also discriminatory under the New Zealand Bill of Rights Act 1990 (NZBORA) and the United Nations (UN) Convention on the Rights of the Child (UNCRC).

iv) Finally, Part V will suggest reform for New Zealand.

While there is no simple solution, WFF can be improved to better meet its objectives. In order to guide reform, WFF will be compared to the corresponding Australian family assistance package. Australia has a lower rate of child poverty than New Zealand on most measures used by the Organisation for Economic Co-operation and Development (OECD),[17] yet its tax policy for families with children is not tied to a work-incentive. Additionally, Australia's tax relief package creates more equitable outcomes as, unlike WFF, it is adjusted for inflation annually.[18] New Zealand could permit all low-income families full access to WFF, by abandoning the two work-incentive schemes and putting the (at least) $600 million saved, towards the remaining two non-discriminatory schemes.[19] Similarly to Australia, WFF could be adjusted annually to account for inflation. The high abatement rates could be scaled back to their original level so that EMTRs are reduced, creating real incentives to seek out additional

15 Philip Spier *Effective marginal tax rates for Working for Families recipients* (Ministry of Social Development and Inland Revenue, Changing Families' Financial Support and Incentives for Working: Annex Report 1, August 2010) at 55.

16 Penny Mok and Joseph Mercante *Working for Families changes: The effect on labour supply in New Zealand* (Treasury, WP 14/18, November 2014) at ii–iii.

17 *CO2.2: Child Poverty* (OECD Family Database Indicator, August 2021) at 2–4.

18 Caitlin Neuwelt-Kearns and Susan St John *Family tax credits: Do children get the support in New Zealand that they would get in Australia?* (Child Poverty Action Group, June 2020) at 5.

19 Susan St John "Urgent reform of Working for Families needed not tinkering" (9 November 2021) University of Auckland <www.auckland.ac.nz>.

hours of work. Reforming WFF so that every family has enough would be a positive step towards New Zealand's "most core value" of fairness.[20]

II PRELIMINARY MATTERS

A Tax Treatment of Benefit Income

New Zealand's income tax system is provided for by the Income Tax Act 2007. The concept of income is complicated to define. However, two notable components are included within the scope of income under the Act: remuneration for paid work, such as a salary or wages,[21] and social-welfare benefit payments from the Government.[22] There are multiple reasons why someone may receive benefit income, other than being a jobseeker unable to find work. For example, Supported Living Payments aid the significantly ill or disabled. Youth Payments provide for 16 and 17-year-olds who cannot live with their parent or guardian and have no one to support them. Student Allowances assist full-time secondary or tertiary students from low-income or refugee families or are on visas such as an Afghan Emergency Resettlement Residency Visa.[23] In the way $100 of wages from employment is taxed at a marginal rate, $100 of benefit income from the Ministry of Social Development is taxed by the Inland Revenue Department (IRD) equivalently.

For families with dependant children, paid work or benefit income must be spread to pay for amenities such as housing, food and clothing. Therefore, these families are less able to contribute to the tax yield than adults with no dependants. Governments around the world endeavour to relieve the tax burden for families with children through various schemes: tax exemptions, tax rebates or tax credits. Tax exemptions refer to a specific source of tax, such as income, that the government decides will be untaxed, irrespective of its quantum. Exemptions can have a regressive effect. For example, if one person earns $20 per day and another earns $200 per day, and their incomes are both exempt from tax, the benefit will be greater to the person earning more. The person with the higher income would have been paying more tax, and therefore will have a greater saving as a result of the exemption. Family tax rebates and credits differ from exemptions, as a set quantum can be refunded

20 Parker, above n 4.
21 Income Tax Act 2007, s CE 1(1)(a).
22 Section CF 1(1)(c).
23 Work and Income New Zealand "A–Z benefits and payments" <www.workandincome.govt.nz>.

to the taxpayer by the IRD or Work and Income New Zealand, to an amount that is greater than the tax owing.[24] For example, if a $30 tax rebate is offered by the government, this $30 is paid out to the taxpayer even if the taxpayer was only due to pay $20 in tax. The terms "credits" and "rebates" are often used relatively interchangeably by the Government in the context of tax relief packages for families.

The effect of these schemes depends on how they are targeted. When tax rebates or tax credits are targeted towards low-income families, they abate as incomes rise, meaning that at certain threshold levels of income the amount of the tax rebate or credit decreases.[25] The rate at which the quantum decreases as income rises is called the abatement rate. Once a family's income reaches a certain threshold, such that the Government considers they no longer need the payment, the quantum of the credit or rebate will reach zero.

The relationship between income and entitlements to family-based tax credits is set out in the Income Tax Act.[26] The quantum of the tax credit depends on a person's "family scheme income",[27] which is "based on their net income, and is adjusted as provided by … subpart [MB of the Act]".[28] Because benefit income is "income" for the purposes of the Act, it is included when calculating family scheme income.

B Child Poverty in New Zealand

An evaluation of the WFF scheme requires an appreciation of the current state of child poverty in New Zealand. One in 10 New Zealand children live in material hardship, meaning they live in households which are unable to afford six or more essential items such as fresh fruit and vegetables, electricity or a visit to the doctor.[29] Chronic poverty-associated diseases like rheumatic fever, which are virtually unknown in other OECD countries such as Canada and the United Kingdom, are entrenched in New Zealand.[30] Furthermore, over

24 Canara HSBC Life Insurance "What is Tax Exemption & How Is It Different From Tax Rebate?" <www.canarahsbclife.com>.

25 Community Law "Law Manual Online – Jobs & benefits – Dealing with Work and Income" <https://communitylaw.org.nz>.

26 Income Tax Act, ss MB 1–MG 4.

27 *New Zealand Master Tax Guide* (2023 ed, Wolters Kluwer, Auckland) at 821.

28 Income Tax Act, s MB 1(1).

29 Child Poverty Action Group "Latest official child poverty measures: 2021/22 (reported March 2023)" <www.cpag.org.nz>; and Stats NZ "Measuring child poverty: Material hardship" (20 February 2019) <www.stats.govt.nz>.

30 Roy, above n 1.

one in four New Zealand children live in after-housing-costs income poverty.[31] This is a particularly important measure in the New Zealand context as it reflects trends in the housing market, including housing inflation.[32]

The ever-increasing unaffordability and unavailability of housing over the past decades further reduces the disposable income available to New Zealand families. As of April 2023, one in nine New Zealanders live in overcrowded homes, where any bedroom in the home is occupied by three or more people.[33] This dark underbelly of New Zealand society has been scrutinised internationally. In a 2023 report, the UN Committee on the Rights of the Child stated that it was "seriously concerned that a significant proportion of children [in New Zealand] live in poverty".[34] Around 50 percent of children living in poverty are Māori or Pasifika.[35] Additionally, increased socioeconomic residential segregation in cities such as Auckland means poverty is not always seen by those living in wealthier areas. These factors likely contribute to an impression among taxpayers that child poverty is a problem for minorities, as opposed to a broader policy issue:[36] "If it's segregated in South Auckland, fine. If it's interrupting my latte asking me for money, we have a problem."[37] However, turning a blind eye to child poverty is a shameful mistake.

III THE HISTORY SHAPING TAX POLICY FOR FAMILIES

Chronic child poverty has not always been so prevalent in New Zealand. In the 1950s, the International Labour Organisation (ILO) endorsed New Zealand's social welfare policy.[38] It is crucial to understand the brief yet transformative period during which the ILO's "model welfare state"[39] retreated from universal welfare for families. Specifically, in the 1980s "Rogernomics" era of neoliberal reforms, policymakers encouraged paid work as the way out of poverty. The

31 Stats NZ, above n 3. This statistic is based on an inclusive measure of poverty (the percentage of children living in households with less than 60 percent of the median disposable income after deducting housing costs).

32 Boston, above n 3, at 5.

33 Finau Fonoa "Housing crisis: Pasifika bearing the brunt of New Zealand's housing shortage" *The New Zealand Herald* (online ed, Auckland, 6 April 2023).

34 *Concluding observations on the sixth periodic report of New Zealand* CRC/C/NZL/CO/6 (28 February 2023) at 11.

35 Child Poverty Action Group, above n 29.

36 Boston, above n 3, at 13–14.

37 Hirini Kaa, an academic on the management committee for the Child Poverty Action Group, explains the attitude of middle-class voters towards addressing child poverty: Roy, above n 1.

38 Baker and Du Plessis, above n 14.

39 Above, n 14.

current tax relief package for families with children, WFF, is a product of the neoliberal ideology that emerged from Rogernomics.

A The 1930s to the Mid-1980s: The Model Welfare State

Tax relief policies for families with children have long existed in New Zealand. A Child Tax Exemption for income tax existed as early as 1913.[40] However, at this time only 12,000 adults out of a 700,000 adult population were required to pay income tax.[41] As income tax evolved, the effect of tax relief for families with children became more significant.

In 1924, following World War One, the League of Nations, of which New Zealand was a member, adopted the Geneva Declaration on the Rights of the Child. The League of Nations urged governments to improve the living standards of mothers and children, and provide adequate income support.[42] This came soon after a "maternalist welfare" movement in New Zealand, whereby the Government began subsidising health and social services for women and children.[43] In 1926, the Government began paying a direct allowance to low-income mothers who were married and had three or more children, to supplement the father's income.[44] In 1929, less than six years after the Declaration was adopted, the United States stock market crashed, sparking the Great Depression of the 1930s. During this time, unemployment in New Zealand was high and many people queued at soup kitchens in order to eat,[45] while unemployed men were expected to live and work in grim work camps.[46] In 1935, the first Labour Government won the election with a promise to recognise every New Zealander's right to a reasonable standard of living. The Government, led by the Rt Hon Michael Joseph Savage, combined an array of new and existing social schemes under the Social Security Act 1938 as a

40 Welfare Expert Advisory Group *A brief history of family support payments in New Zealand* (Background Paper, July 2018) at 3.

41 Patrick Nolan "Targeting Families' Assistance: Evaluating Family and Employment Tax Credits in New Zealand's Tax-Benefit System" (PhD Thesis, Victoria University of Wellington, 2005) at 98; and Paul Goldsmith "Taxes – War, depression and increased taxes – 1914 to 1935" (2 September 2016) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

42 Maureen Baker and Rosemary Du Plessis "Family welfare – Welfare, work and families, 1918–1945" (29 June 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

43 Maureen Baker and Rosemary Du Plessis "Family welfare – Mothers and children – 1800s to 1917" (29 June 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

44 Baker and Du Plessis, above n 42.

45 New Zealand History "Social Security Act passed" (4 September 2020) <https://nzhistory.govt.nz>.

46 Paul Harris "The New Zealand Unemployed Workers Movement, 1931–1939: Gisborne and the Relief Workers' Strike" (1976) 10(2) NZJH 130 at 131–133.

response to the Great Depression.[47] The Act's premise was one of community responsibility for ensuring people could protect themselves against economic ills. Taxes introduced at this time, such as flat taxes, introduced the idea that everyone should contribute by way of direct tax.[48]

In 1946 a universal family benefit was introduced.[49] Instead of being a means-tested benefit, this benefit provided every mother with income for each child under the age of 16.[50] The payment was ten shillings per week per child (approximately $50 in 2023 dollar-value).[51] Supplementary assistance was introduced in 1951 to meet specific costs of raising children, including the costs of childcare.[52] Then, in 1958, the value of the long-standing Child Tax Exemption was clarified as being a maximum of £75 per annum per child, depending on tax owed (approximately $4,300 in 2023 dollar-value for every mother).[53]

Exemptions in the tax system to recognise dependants, such as children, were common throughout the decades following the Great Depression. Women with two children received, in weekly benefit payments, the equivalent of at least a full day's wages for a labourer. These benefit payments were untaxed.[54] These payments recognised the work involved in raising children. In a 1967 report, the Taxation Review Committee stated that:[55]

> It is probably universally accepted, and it is certainly accepted in New Zealand, that a direct income tax system should be so designed … so that a taxpayer with other dependents, for example, children, pays less tax than another taxpayer on the same income who has no or fewer dependents.

A Royal Commission of Inquiry into Social Security was established in 1969, inspired by two issues: benefit adequacy, and changing attitudes to sex and

47 Baker and Du Plessis, above n 42; and New Zealand History, above n 45.
48 Goldsmith, above n 41.
49 Maureen Baker and Rosemary Du Plessis "Family welfare – Family autonomy and state policy" (29 June 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.
50 Welfare Expert Advisory Group, above n 40, at 4.
51 Based upon calculation by: Reserve Bank of New Zealand "Inflation Calculator" (18 October 2022) <www.rbnz.govt.nz>.
52 Welfare Expert Advisory Group, above n 40, at 4.
53 At 4–5.
54 Anne Beaglehole *Benefiting Women: Income Support for Women 1893-1993* (Social Policy Agency, Department of Social Welfare, ISBN 0-478-06013-0, 1993) at 10.
55 At 5.

marriage in the 1960s.[56] One of the Commission's core goals was for the Government to ensure that everyone was able to enjoy a standard of living on par with that of the rest of the community.[57] The Commission recommended the elimination of the universal Child Tax Exemption, explaining that it had provided the greatest value to those with higher incomes (and thus higher corresponding tax obligations).[58] Acting on this recommendation, the Government removed the Child Tax Exemption in 1972 and increased the Family Benefit, which doubled from $1.50 to $3 per week per child (approximately $49 in 2023). Whilst the Family Benefit was still a universal payment, it was anticipated that these changes would have the greatest benefits for low-income families, being more targeted than the Exemption.[59]

An economic downturn culminating in a recession in 1976 caused many taxpayers to struggle to achieve income adequacy.[60] Targeted schemes were implemented almost immediately to assist families on low incomes. These are summarised in the table below:[61]

	Enacted	Target	Entitlement	2023 Value (estimate)	Abatement	Withheld from beneficiaries?
Young Family Tax Rebate	1976 – 1982	Principal income earners of low-income families with a child under five. Did not vary with the number of children.	$9 per week.	$76 per week.	Abated against principal income earner's income once it reached a threshold of $13,710 annually (approximately $105,700 in 2023).	No

56 Margaret McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969–1979" (2003) 34 VUWLR 269 at 270.

57 Thaddeus McCarthy and others *Social Security in New Zealand: Report of the Royal Commission of Inquiry* (March 1972) at 65.

58 At 221–223 and 239.

59 At 224; and Welfare Expert Advisory Group, above n 40, at 7–11.

60 New Zealand History "The 1970s – Overview" (28 September 2021) <https://nzhistory.govt.nz>.

61 Welfare Expert Advisory Group, above n 40, at 6–10.

Single Income Family Tax Rebate	1977 –1980	Income earners in low-income families with a child under 12. Did not vary with the number of children.	$5 per week.	$37 per week.	Abated against income of any second caregiver once it reached a threshold of $1,040 (approximately $7,150 in 2023).	No
Low Income Family Rebate	1980 – 1982	Principal income earners and sole parents with a child under 18 who qualified to receive the Family Benefit.	$9 per week.	$43 per week.	Abated against family income once it reached a threshold of $9,800 (approximately $44,900 in 2023).	No
Family Tax Rebate	1982 –1986	Principal income earners and sole parents with a child under 18 who qualified to receive the Family Benefit.	$27 per week.	$122 per week.	Abated against family income once it reached a threshold of $9,800 (approximately $44,900 in 2023).	No

By 1982, the different schemes had been amalgamated into the Family Tax Rebate. Critically, these schemes targeted all low-income families, regardless of their work or employment status. Families could still qualify if they were receiving a benefit. Following the enactment of the targeted rebate schemes, the child poverty rate decreased from 14 percent to approximately 10 percent.[62]

B The Mid-1980s to 1990s: The Rogernomics Era

Despite their initial success, the targeted tax rebates were relatively short-lived. A moment of pivotal change in tax policy for families occurred during the "Rogernomics" era of the late 1980s. During the economic downtown of the

62 Royal Society | Te Apārangi *Spotlight on Poverty* (December 2021) at 29.

1970s, Prime Minister Robert Muldoon attempted to lift other areas of the economy by imposing strict currency controls, wage freezes and import tariffs. When the fourth Labour Government (led by Prime Minister David Lange) came to power in 1984, it renounced Muldoon's strict controls. Instead, Lange's Finance Minister Roger Douglas promoted a radical free market system in which the role of the Government was drastically reduced.[63]

Rogernomics ushered in two key changes to the tax system. First, the highest rate of income tax was decreased from 66 to 33 percent[64] and the corporate tax rate was decreased from 48 to 33 percent.[65] Second, in 1986 the Government introduced the Goods and Services Tax (GST), adding 10 percent to the cost of most goods and services. Because GST is charged at a flat rate for all consumers, it is effectively a regressive tax, as those with the lowest incomes pay the highest proportion of their income towards GST.[66]

An important consequence of the shrinking Government was that benefit income underwent significant cuts. Instead of social welfare, paid work was promoted as the solution to poverty for struggling families. The Government implemented policies that rewarded parents for obtaining full-time work, to make the transition into full-time work more worthwhile.[67] The targeted Family Tax Rebate was replaced with two main tax credits: the Family Support Tax Credit (FSTC) and the Guaranteed Minimum Family Income tax credit (GMFI).[68] The FSTC replaced the existing targeted rebates with one low rate payment,[69] and the GMFI was a tax credit designed to increase the gap between the incomes of full-time earners and beneficiaries.[70]

The goal of the GMFI was to ensure that there was an advantage, at least in the short term, to shifting from reliance on benefit payments into paid employment. It also aimed to encourage caregivers working part-time to work full-time. Caregivers working low-wage or low-salary jobs would likely have been unable to afford to pay for transport or childcare after meeting their tax

63 New Zealand History "The 1980s – Overview" (12 April 2023) New Zealand History <https://nzhistory.govt.nz>.

64 Easton, above n 8, at 89.

65 Bernard Hickey "A one-day epic tax fail – and the far bigger tax tragedy behind it" *The Spinoff* (online ed, New Zealand, 1 September 2022).

66 New Zealand History "Goods and Services Tax Act introduced" (5 October 2021) <https://nzhistory.govt.nz>.

67 Welfare Expert Advisory Group, above n 40, at 9–11.

68 These changes were introduced by the Income Tax Amendment Act (No 2) 1986.

69 "Income Tax Amendment Act (No 2) 1986" (1986) 151 PIB.

70 Welfare Expert Advisory Group, above n 40, at 10.

obligations, so the GMFI was designed to make employment worthwhile. To be eligible to receive the GMFI, a taxpayer had to be working at least 30 hours per week for a two-parent family, or 20 hours per week for a single-parent family.[71] The payment ensured a minimum net income for working parents with dependant children, but with the qualification that the family was otherwise completely non-reliant on the Government.[72]

Although Labour was voted out of office following Lange, the 1990 National Government inherited Roger Douglas' legacy and set about further cutting benefits.[73] The universal Family Benefit was permanently discontinued in 1991 and its funding was redirected to the FSTC.[74] When the FSTC was given a belated inflation adjustment in 1996, consisting of an additional $20 per week per child, the lowest income families were excluded from the bulk of the increase. Of that $20, $15 was directed to a new Independent Family Tax Credit (IFTC), which was denied to families in which the parents were receiving a benefit.[75] The work incentive was at the very core of these changes. The difference between what beneficiary families received from the FSTC compared to what employed families received via the FSTC, GMFI, and IFTC was stark:[76]

	Enacted	Target	Entitlement	2023 Value (estimate)	Abatement	Withheld from beneficiaries?
Family Support Tax Credit	1986–2004	Replaced the Family Tax Rebate.	$36 for the first child and $16 for following children.	$97 for the first child and $41 for subsequent children.	Abated at 18 cents for each $1 above $14,000 gross annual family income (approximately $40,650 in 2023).	No

71 At 10.

72 Patrick Nolan *New Zealand's Family Assistance Tax Credits: Evolution and Operation* (Treasury, WP 02/16, September 2002) at 1.

73 Maureen Baker and Rosemary Du Plessis "Family welfare – Family policy, 1980–1999" (29 June 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

74 Welfare Expert Advisory Group, above n 40, at 11.

75 Claire Dale, Mike O'Brien and Susan St John (eds) *Left further behind: how policies fail the poorest children in New Zealand* (Child Poverty Action Group, September 2011) at 52.

76 Welfare Expert Advisory Group, above n 40, at 9–12 and 24–28.

Guaranteed Minimum Family Income (later renamed the Family Tax Credit)[77]	1986–2004	Caregivers working 30 hours per week for a two-parent family or 20 hours per week for a solo parent.	Up to $250 net per week.	Up to $678 net per week.	Between the guaranteed minimum income and a net income of $15,080 (approximately $28,150 in 2023), every dollar increase in net income matched by a dollar abatement.[78]	Yes
Independent Family Tax Credit (later renamed the Child Tax Credit)	1996–2004	Non-beneficiary families. [79]	$15 per week.	$28 per week.	The Child Tax Credit is added to the FSTC for abatement purposes and abated at the rate prescribed for the FSCT above.[80]	Yes

C The 2000s: Working for Families

While many New Zealanders still wanted the Government to protect the vulnerable in society, the public enjoyed lower taxes and developed a hostile attitude to those on benefits — who were seen as a drain on the public purse. Due to the neoliberal reforms, child poverty rates rose sharply in the 1990s[81] and inequality climbed more quickly in New Zealand than in any other OECD country for which comparable data is available.[82]

In 2001, child poverty in New Zealand was the 10th highest in the 26 nations of the OECD, doubling since the origin of Rogernomics.[83] Child poverty had become a global embarrassment for New Zealand and in 2002 the Labour Government made a commitment to eradicating it.[84] The main

77 The GMFI and IFTC were renamed in the Taxation (Parental Tax Credit) Act 1999 (No 62 of 1999). These two tax credits, plus a new Parental Tax Credit for new-born children, were put under the umbrella grouping called the "Family Plus" scheme: Welfare Expert Advisory Group, above n 40, at 12 and 25.

78 Nolan, above n 72, at 6-7 and 16.

79 At 5.

80 At 5.

81 Boston, above n 3, at 11.

82 Michael Fletcher and Máire Dwyer *A Fair Go for all Children: Actions to address child poverty in New Zealand* (Office for the Children's Commissioner, August 2008) at 4.

83 Nick Johnson *'Working for Families' in New Zealand: Some Early Lessons* (Fulbright New Zealand, July 2005) at vi; and Boston, above n 3, at 2.

84 Dale, O'Brien and St John, above n 75, at 52.

alleviation effort that was introduced was the WFF package, announced by the Labour Government in 2004.[85] The WFF had three key aims:[86]

i) to make work pay by ensuring that people are better off by being in work and are rewarded for their work effort;
ii) to ensure income adequacy, with a focus on low to middle income families with dependant children, to address issues of poverty, especially child poverty; and
iii) to support people into work by ensuring people get the assistance they should, to support them into, and to remain in, work.

Considering the package was introduced to eradicate child poverty resulting from neoliberalism, it appears counterintuitive that the Government referred to the regime as part of "our commitment to ensuring that economic growth is pursued".[87] WFF initially consisted of three tax credits:

i) *Family Tax Credit*. This is a refundable tax credit aimed at all low-income caregivers with dependant children under the age of 18. This tax credit can be received regardless of employment or beneficiary status. The credit currently consists of $127 per week for the first child, and $104 for each subsequent child.[88]
ii) *Minimum Family Tax Credit*. This is considered a minimum basic income for parents with dependant children, but it is restricted to parents working full-time. Full-time work is classified, again, as being 30 hours for a two-parent family, or 20 hours for a sole parent.[89] It is currently worth between $0 and $632 per week, depending on gross weekly family salary.[90] It cannot be paid to those receiving certain benefits, such as Jobseeker Support, the Supported Living Payment or Sole Parent Support.[91] To put these exclusions in perspective, the Minimum Family Tax Credit

85 To be enacted through the Taxation (Working for Families) Act 2004.
86 (27 May 2004) 617 NZPD 13395.
87 At 13395.
88 Inland Revenue Department "Working for Families Tax Credits 2023" (April 2022) <www.ird.govt.nz>.
89 Income Tax Act, ss MA 7(1) and ME 1.
90 Inland Revenue Department, above n 88.
91 Income Tax Act, ss MC 6(b)(i) and YA 1 definition of "main benefit" (importing the definition of "main benefit" in sch 2 of the Social Security Act 2018).

is paid to 3,900 low-income families while the Family Tax Credit is paid to 280,100 low and middle-income families.[92]

iii) *In-Work Tax Credit*. This is a payment of, at most, $72 per week for one to three children and an additional $15 for each subsequent child. It is available to families who have some income from paid work each week.[93] When first introduced, this tax credit also had working requirements of 30 or 20 hours, similar to the Minimum Family Tax Credit. However, during the COVID-19 lockdowns, the Government dropped these hourly requirements. This has resulted in the somewhat ambiguous requirement that the person must normally be an "earner", in the sense that they are "employed during the week", and derive income as an earner.[94] However, it is clear that the In-Work Tax Credit cannot be received by those also receiving certain benefits, such as the benefits previously discussed.[95]

In 2017, the newly elected Labour and New Zealand First Coalition Government announced it would focus on helping lower and middle-income families with children.[96] It announced a Families Package in November 2017, which came into effect in July 2018.[97] The Families Package targeted child poverty by increasing support for caregivers. This had been a key goal specified in the confidence and supply agreement Labour signed with the Green Party.[98] The package was built on WFF but introduced a fourth tax credit for families with a child aged one to three years — the Best Start Tax Credit. This is a partly universal (to the child reaching the age of one) and partly targeted payment. Before the child reaches one year of age, a family may receive a universal benefit of $65 per week. When the child is aged between one to three years, the payment targets low-income families: for every dollar earned over a $79,000 annual

92 Ministry of Social Development "Guidance material for Working for Families consultation" <www.msd.govt.nz>.

93 Inland Revenue Department, above n 88.

94 Income Tax Act, ss MA 7(1B) and MD 9(1).

95 Income Tax Act, ss MC 6(b)(i) and YA 1 definition of "main benefit" (importing the definition of "main benefit" in sch 2 of the Social Security Act).

96 "Speech From the Throne" (13 November 2017) *New Zealand Gazette* No 2017-vr5943.

97 Caitlin Neuwelt-Kearns and Susan St John *Ensuring adequate indexation of Working for Families* (Child Poverty Action Group, May 2021) at 6.

98 "Cooperation Agreement between the New Zealand Labour Party and the Green Party of Aotearoa New Zealand" (26 October 2017) at 4.

family income threshold, the entitlement is reduced by 21 cents.[99] As part of the 2018 Families Package, the Family Tax Credit was increased so that families could keep the same standard of living notwithstanding inflation.[100] Despite this inflation adjustment, the Government compensated for the increase by increasing WFF abatement rates from 22.5 percent in 2017 to 27 percent in 2022,[101] causing higher EMTRs for families.

The In-Work Tax Credit and the Minimum Family Tax Credit are still withheld from beneficiaries. This has ramifications for the children of beneficiaries, who cannot receive the benefit of this additional support. Despite the introduction of WFF as a child poverty alleviation measure, a quarter of New Zealand children still live below the poverty line.

IV ANALYSING NEW ZEALAND'S CURRENT TAX POLICY FOR FAMILIES WITH CHILDREN

Adam Smith, in his 1776 book *An Inquiry into the Nature and Causes of the Wealth of Nations*, stated maxims for evaluating tax regimes that are still widely regarded as useful in assessing tax policy.[102] Part IV will evaluate WFF in terms of relevant Smith maxims: horizontal equity, vertical equity and efficiency. Part IV will also analyse the discrimination within WFF, by reference to the domestic NZBORA and the international UNCRC.

A WFF Inequities

American economist Henry Simons articulated the fundamental principle that liability for tax should be a function of the ability to pay it.[103] Naturally, the income of families with dependant children must be spread further than adults with no dependants, to pay for amenities such as housing, food, clothing, childcare and education resources. Consequently, these families have a lesser ability to contribute to the tax yield. The Tax Working Group's paper on

99 Inland Revenue Department, above n 88.

100 Neuwelt-Kearns and St John, above n 97, at 6–7.

101 Inland Revenue Department "Family Tax Credit Bill passed" (25 November 2021) <https://taxpolicy.ird.govt.nz>; and Treasury "The Families Package" (14 December 2017) <www.treasury.govt.nz>.

102 Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (S. M. Soares, MetaLibri Digital Library, 29 May 2007) at 639-641.

103 Henry Simons *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (University of Chicago Press, Chicago, 1938) at 50.

fairness in 2018 identified vertical and horizontal equity as two main standard frameworks for considering fairness.[104]

1 Vertical Inequity

Henry Simons stated that those who have a greater ability to pay should contribute more tax.[105] Roger Douglas' proposal for a 24 percent flat income tax rate immediately conflicts with this principle. The subsequent compromise by Lange has led to New Zealand's income tax system being considered one of the flattest among developed countries.[106] Any income tax scheme in New Zealand that has vertical inequities will have an exaggerated effect because the income tax system is already relatively flat.

The inequity emerges at the heart of WFF. The conflated objectives of WFF, as stated in Part III, are to reduce poverty and incentivise paid work. The result of this attempt to get caregivers back into paid work is that the living standards of children whose parents are on benefit income are worsened, compared to those of children whose parents are working. In other words, children in poverty are kept in poverty because their caregivers are being incentivised to find employment. To illustrate this, the In Work Tax Credit, part of the WFF package, is worth $72 per week for a one to three child family, and $15 more for each subsequent child. When caregivers lose jobs and fail to meet the work requirements, a family of four children immediately loses $87 of the In Work Tax Credit per week. These households are thrust $4,550 further into poverty annually.[107] Removing support from these households means the In Work Tax Credit cannot meet its income adequacy objective. Families who are the worst off receive less tax relief on their gross benefit income than those families receiving a higher employment income. This violates the maxim of vertical equity.

WFF has not greatly improved the level of poverty in families where the parents are not in paid employment. The largest per-child increases in family incomes under WFF are likely to be enjoyed by families with incomes above

104 Tax Working Group Secretariat *Tax and fairness: Background Paper for Session 2 of the Tax Working Group* (Inland Revenue Department and New Zealand Treasury, February 2018) at 3.

105 Simons, above n 103, cited in Joseph Dodge *Deconstructing the Haig-Simons Income Tax and Reconstructing It as Objective Ability-to-Pay 'Cash Income' Tax* (FSU College of Law, Public Law Research Paper No. 633, 5 April 2013) at 4; citing Simons, above n 103.

106 Johnson, above n 83, at v.

107 Based on the data available in: Inland Revenue Department, above n 88, at 1.

the poverty line.[108] Empirical evidence showed that approximately 41 percent of credits from WFF are estimated to go toward one fifth of families with incomes in the middle of the income distribution. WFF tax credits boost the disposable income of a working parent by 18 percent as they enjoy the full package. Meanwhile, a typical unemployed sole parent with two children has their disposable income increased by only eight percent by WFF.[109] This clearly disadvantages sole parents (most often women), who find it harder to work the required hours to receive the full package, compared to working couples who can balance childcare and share the burden of hours worked. These incentives further contribute to the perpetuation of intergenerational cycles of poverty and dependency. Three years after WFF was introduced, the poverty rate for children in unemployed households rose to be around six or seven times higher than that for children in working households.[110]

Tax credits tied to work incentives also create vertical inequity between women and men. Based on 2022 data, women earn on average 10 percent less than men for the same hours worked because women tend to be employed in lower paid industries, and female-dominated industries are valued less than male-dominated industries.[111] Yet the scheme does not take this into account. This puts a larger burden on single parents, who must work at least 20 hours per week, as opposed to two parents in a couple, who could each work 15 hours.

The vertical inequity of WFF is highlighted when compared to New Zealand Superannuation (NZS), the scheme aimed at income adequacy for persons aged over 65 years.[112] In the late 1970s, many elderly people experienced poverty as their savings diminished due to high inflation. In 1977 Muldoon's third National Government set up a universal scheme called National Superannuation, which paid 80 percent of the average wage to married people over 60 years old. This scheme has been credited with remedying poverty among the elderly.[113] NZS is understood as an effective basic income for every person over the age of 65 years. It has been successful in providing unconditional

108 Johnson, above n 83, at vi.

109 Johnson, above n 83, at vii.

110 Neuwelt-Kearns and St John, above n 97, at 6.

111 Employment New Zealand "Gender pay gap" (2022) <www.employment.govt.nz>.

112 Work and Income New Zealand "New Zealand Superannuation (NZ Super)" <www.workandincome.govt.nz>.

113 David A Preston *Redesigning the Welfare State in New Zealand: Problems, Policies, and Prospects by Jonathan Boston, Paul Dalziel and Susan St John Oxford University Press* (Ministry of Social Development, Social Policy Journal of New Zealand, July 1999) at 4.

support and reducing poverty. In his thesis on consumption in retirement, Robert Lissington reported that low-wealth retirees typically said NZS was sufficient to meet their needs.[114] There are no notable objections to the scheme's large reliance on the Government, despite it costing taxpayers approximately $17.8 billion per annum.[115]

WFF payments, which are subject to steep abatement rates, are reduced much more severely as incomes rise, than NZS. Regardless of how much a pensioner earns from other income, the highest marginal tax rate they will face in 2023 is 39 percent on income over $180,000. As their income rises, due to paid work for example, there is no requirement to abate their Superannuation.[116] Additionally, NZS is adjusted not only for inflation, but also against wage growth. The Government has ensured that NZS never drops lower than 66 percent of the average net wage for a couple, with some adjustments for being single and living alone.[117] When NZS is adjusted each year, increases do not attract vast criticism or media coverage, and there is no requirement that NZS be reserved only for those who once contributed to the economy. On the other hand, WFF is adjusted only once cumulative inflation exceeds five percent. In fact, the Families Package of 2018 was the first time in six years that WFF was adjusted. It is not wage-indexed, meaning the level of income support is constantly eroded, and changes are made on an ad hoc basis. If WFF payments had been indexed similarly to NZS, families receiving WFF would have received $27 more per week for the year ending June 2021 than they actually did.[118] Although both the WFF and NZS have recipients that are not in paid employment, young families are less able to pay taxes due to the costs of raising children and increased housing costs. Nevertheless, beneficiaries receiving WFF are penalised more than superannuitants.

2 *Horizontal Inequity*

Horizontal equity is another criterion of fairness against which to evaluate the New Zealand tax system, and requires that those with the same ability to pay

114 Robert John Lissington "How prepared are New Zealanders to achieve adequate consumption in retirement?" (PhD Thesis, Massey University, 2018).

115 Figure.NZ "Core Crown Spending on superannuation and welfare benefits in New Zealand" (June 2022) <https://figure.nz>.

116 Work and Income New Zealand, above n 112.

117 Susan St John "Children shouldn't pay for our broken system" (24 March 2022) Newsroom <https://www.newsroom.co.nz>.

118 Neuwelt-Kearns and St John, above n 97, at 4.

should have the same tax liability.[119] WFF focuses on the income of the family unit as a whole when determining eligibility for tax credits.[120] Because of this mechanism, the tax system rewards a two-parent family where one partner works full-time, and the other stays home and cares for the couple's children. For example, a mother who is partnered to a full-time worker, but stays home with her child, can receive the full package of tax credits if her partner meets the 30-hour work test. However, a single mother, raising a child alone, is more likely to rely on an income-tested benefit to make ends meet. A single mother is therefore more likely to be denied the full WFF package, while the mother in the first scenario receives the full tax credit because of her relationship status. This results in horizontal inequity.

Furthermore, taxation on the basis of the family unit disproportionately impacts mothers in the two-parent families that are envisaged by these policies, compared to their partners. It is generally the mother who will have taken time off from work due to having children, the gender pay gap and social and cultural norms towards working mothers (although these are slowly changing).[121] When the mother returns to work, she may have the same income as her partner. But because WFF taxes the family unit, her income may bring the couple over the relevant abatement threshold so that their tax credits are abated, meaning the cost of going back to work is greater, and there is less incentive for the mother to do so than for her partner. This means that even when the mother and her partner have the same earnings, the mother's income effectively contributes less to the disposable income of the household than her partner, because that same amount of income means a greater amount of tax paid.

B WFF Inefficiencies and Incentives

Efficiency is an important criterion for assessing a tax system.[122] In economic terms, this refers to minimising deadweight loss to society.[123] The WFF is inefficient, and whilst WFF aims to incentivise work, high EMTRs frustrate this objective.

119 Parker, above n 4.
120 Income Tax Act 2007, s MB1.
121 Jing Jing (Alice) Wang "Is It Fair to Share? Income Splitting for Families" (2013) 19 NZJTLP 75-90.
122 Parker, above n 4.
123 Smith, above n 102, at 640.

1 *Inefficiencies*

WFF has steep abatement rates. When additional income is earned, some income will go towards paying tax obligations, while some will make up for abating benefits.[124] The EMTR measures not only the tax liability, but also the loss of benefits for each additional dollar of income earned. This is the best measure for an incentive scheme. A family with two children and a single income earner on a salary of $60,000 pays no net tax. The amount they get through WFF, matches the amount they pay in income tax on their earnings. The issue arises on the next dollar earned, which, for a single earner family, draws 30 cents in income tax and a 27 percent reduction in the family tax credit. The Government raised the abatement rate from 25 to 27 percent in 2022 to claw back the average family assistance (even though the tax credit increase was simply an adjustment for inflation).[125] This had been gradually increased from 20 percent in 2012, for the same reasons.[126] Effectively, this family faces a 57 percent tax rate on the next dollar earned. This matters when deciding hours of work, whether to put in extra effort to get a promotion, or whether the second earner should pick up more hours. Feeling as though one is taking home less than half of their earnings compared to before is discouraging. Increased income will lead to much smaller increases in disposable income once income tax, WFF abatement, student loan repayments, ACC levies or accommodation supplements are taken into account.[127] As opposed to getting "hurt by the fall", recipients may "scramble to stay at the edge of the slide".[128] In 2008, 35 percent of WFF recipients faced an EMTR between 50 and 75 percent. Two percent of WFF recipients even had an EMTR above 100 percent.[129]

Treasury's evaluation of WFF on labour supply showed that shortly after the In Work Tax Credit was introduced, sole parents on average worked a smaller proportion of increased hours per week than parents with a partner.

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124 Johnson, above n 83.

125 St John, above n 19.

126 Inland Revenue Department "Taxation (Annual Rates and Budget Measures) Act 2011: Working for Families tax credits" (2011) <www.taxtechnical.ird.govt.nz>.

127 Susan St John "Working for Families isn't working for poor families" (21 September 2021) The Daily Blog <https://thedailyblog.co.nz>.

128 Dr Eric Crampton "Working for Families is a mess that can't be cleaned up" (14 June 2022) Newsroom <www.newsroom.co.nz>.

129 Philip Spier *Changing Families' Financial Support and Incentives for Working Annex Report 1 Effective marginal tax rates for Working for Families recipients* (Inland Revenue Department and Ministry of Social Development, August 2010).

This is likely due to the fact that a single parent, usually a mother, cannot simply pick up more work, and must balance the incentives against extra childcare costs. Additionally, married women did fewer total hours of work than before the In Work Tax Credit was introduced. Due to the substitution effect of the Credit, they felt they could afford to spend more time raising children, whilst having the same disposable income. Evidently, high EMTRs have an adverse impact on economic efficiency by deterring parents from working more hours.

2 Incentives

A number of assumptions about beneficiaries from the Rogernomics era still form the basis of WFF work incentives. In 2011, Prime Minister John Key said that families requiring food parcels had made poor choices because "anyone on a benefit actually has a lifestyle choice".[130] In 2013, Fairfax published cartoons by Al Nisbet, in response to the Government's proposal of free breakfast in low-decile schools. The cartoons depicted Māori and Pasifika caregivers sneaking into schools wearing their children's uniforms, and were captioned "more cash left for booze, smokes and pokies!".[131]

These assumptions about beneficiaries fail to take into account the complexities of social welfare in New Zealand. The suggestion that child poverty tripled during the 1980s and 1990s due to lifestyle choices is not only absurd, but also inconsistent with the evidence.[132]

Generalisations about beneficiaries also fail to take into account the systemic deprivation experienced by minorities in New Zealand. Māori are over-represented in the benefit system, making up 36 percent of benefit recipients and only 15 percent of the total population in 2018.[133] The systemic effects of colonisation are too vast a topic to explore within the scope of this article. However, it is important to note that neoliberalism has a tendency to reinforce land loss, assimilation and colonisation of indigenous peoples, leading to adverse living standards for these groups worsening to an "increasingly intolerable extent".[134] Simply incentivising paid work oversimplifies these significant issues and will likely lead to little change.

130 Claire Trevett "Food parcel families made poor choices, says Key," *The New Zealand Herald* (online ed, Auckland, 17 February 2011).

131 *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17 at [20].

132 Boston, above n 3, at 13.

133 Welfare Expert Advisory Group "Our Welfare System" (2018) <www.weag.govt.nz>.

134 Brianna Poirier and others "The impact of neoliberal generative mechanisms on Indigenous health: a critical realist scoping review" (2022) 18 Globalisation and Health 61 at 2.

C Discrimination in WFF

New Zealand has codified the rights of children in various laws. The UNCRC was adopted and opened for signature, ratification and accession by the General Assembly in November 1989, and entered into force in September 1990. New Zealand ratified the Convention in April 1993.[135] Article 2 states the Convention applies to "every child without discrimination … whatever their family background". Article 3 states that the best interests of the child must be a top priority in all decisions and actions affecting children. Finally, Articles 26 and 27 provide that "[g]overnments must provide social security, including financial support and other benefits, to families in need of assistance"; and that "every child has the right to an adequate standard of living … Governments must help families who cannot afford to provide this".[136] Children should be at the forefront of the WFF policy. However, by discriminating against children in beneficiary families, WFF breaches New Zealand's international obligations.

Furthermore, the NZBORA protects against discrimination by the Government and legislature, including on the basis of employment status.[137] WFF discriminates against children based upon their caregiver's work status, over which a child has no control whatsoever.

The Child Poverty Action Group (CPAG) litigated this issue in the Court of Appeal in 2013.[138] CPAG is a non-profit group formed to advocate for more informed social policy to support children in New Zealand. It brought the case on behalf of 250,000 children whose parents were unfairly excluded from the In Work Tax Credit. CPAG argued that the In Work Tax Credit was unlawfully discriminatory. This argument was based upon New Zealand's commitments from ratifying the UNCRC, as well as the NZBORA. The Court of Appeal concluded that "beneficiaries with children are materially disadvantaged by the lack of comparable gain, namely, the ability to receive the in-work tax credit".[139] The Court determined that the In Work Tax Credit was prima facie discriminatory because of the exclusion of persons receiving an income-tested benefit from eligibility.[140] However, the Court concluded that

135 Ministry of Justice "UN Convention on the Rights of the Child" (19 August 2020) <www.justice.govt.nz>.

136 *United Nations Convention on the Rights of the Child* GA Res 44/25 (1989), arts 2-27.

137 New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21(k).

138 *Child Poverty Action Group Incorporated v Attorney-General*, above n 12.

139 At [72].

140 At [75].

due to the particularly complex economic, social policy and tax issues, and the legislature's prerogative to decide on such issues, the discrimination fell within s 5 of the NZBORA and was a justified limitation on rights.[141] While CPAG was unsuccessful in the Court of Appeal, it did not appeal to the Supreme Court. Instead, CPAG left the case to the court of public opinion. CPAG stated that:[142]

> … the courts are not ready or equipped to give a rational decision on justification, other than on the same grounds of narrow case reasoning without a real understanding either of how so many children are seriously harmed and their rights ignored, or of the economics of in work benefits and their proper design.

This result is illustrative of how the issue will only be able to be resolved as a matter of policy making, meaning it is up to the public to advocate for change to be made in this space.

V REFORMING NEW ZEALAND'S TAX POLICY FOR FAMILIES WITH CHILDREN

After Labour won the 2017 election, it vowed to make incremental and sustainable changes to policy for families with children. In 2019, the Welfare Expert Advisory Group issued a report on New Zealand's social security system which made 42 key recommendations, such as amending the overarching principles of the welfare system in New Zealand legislation, to increasing benefit levels.[143] In 2023, four years after the report was released, the Government has failed to fully implement any of these 42 key recommendations.[144] A review of WFF is currently underway, with public consultation closing at the beginning of June 2022.[145] Part V of this article will explore what potential reform could look like in New Zealand, using the corresponding Australian scheme as a comparator.

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141 At [149]–[153].

142 Child Poverty Action Group "Supreme Court no route to Justice for 230,000 kiwi kids" (September 2013).

143 Welfare Expert Advisory Group *Whakamana Tāngata – Restoring Dignity to Social Security in New Zealand* (February 2019).

144 Michael Neilson "WEAG welfare overhaul update, Govt defends $14.6b programme while anti-poverty campaigners say 'woefully slow'" *The New Zealand Herald* (online ed, 21 March 2023).

145 Work and Income New Zealand "Public consultation on Working for Families" (20 April 2022) <www.workandincome.govt.nz>.

A Australia's Family Assistance Scheme

The neoliberal reforms of the 1980s to 1990s were not unique to New Zealand. Other OECD countries also amended their tax policies to reduce the size and role of the Government. However, New Zealand's changes to tax policy for families with children were particularly severe, producing a policy which was less generous and more targeted towards paid work than Australia's.[146] While both Australia and New Zealand give tax relief to the caregiver to help with the costs of children, the Australian scheme has become more nuanced than New Zealand's.

The package in Australia consists of Family Tax Benefit Part A (FTBA) and Part B (FTBB), which is available to parents with dependant children aged zero–15 years, or aged 16–19 years if they are still in full-time education. FTBA is paid per child and the amount is based upon family circumstances. Families on low incomes are entitled to the maximum FTBA rate of AUD 197.96 (NZD 215)[147] per fortnight per child aged up to 12, and AUD 257.46 (NZD 279) every fortnight per child aged 13–19. FTBB is a targeted payment with specific eligibility criteria that seeks to compensate for limited engagement with the workforce due to family circumstances. This includes single-parent families or two-parent families with a sole income earner. Single parents automatically receive the maximum amount of FTBB, which is AUD 168.28 (NZD 182) per fortnight per child under five years and AUD 117.46 (NZD 127) per child aged five–18 years.[148]

There are significant differences between the Australian and New Zealand schemes. First, neither the Australian FTBA nor the FTBB require parents to be in paid employment to be eligible. In Australia, children whose caregivers are unemployed do not receive less support. Additionally, the Australian system better accounts for the financial stresses of being a sole parent on a low income. Under the Australian system, sole parents earning less than AUD 100,000 (NZD 108,344) are automatically entitled to the maximum FTBB payment. The result is a more horizontally and vertically equitable distribution of income support. Compared to Australia, all low-income families in New Zealand receive less, but in particular, families receiving benefits receive much

146 Neuwelt-Kearns and St John, above n 18.

147 Conversions to NZD based on a 1.083 conversion rate: Forbes Advisor "AUD To NZD" (23 October 2023) <www.forbes.com>.

148 Services Australia "Family Tax Benefit" (10 December 2021) <www.servicesaustralia.gov.au>.

less tax relief in New Zealand than in Australia. In 2020, a sole working parent earning NZD 85,000 with two children aged 13 and 17 could receive $3,536 per annum. The same parent earning an equivalent amount in Australia could receive AUD 9,776.90 (NZD 10,593) per annum. A sole parent on an income benefit, with three children aged two, five and 14, could receive NZD 18,460 per annum. However, in Australia, they would receive AUD 28,519.44 (NZD 30,897) per annum.[149] From 1 July 2020, the New Zealand WFF requirement to work a minimum number of hours was removed as a result of Covid-19. This is likely to have softened the differences slightly, however there will still be a sizeable gap between the positions of New Zealand and Australian beneficiaries.

Australia is not New Zealand's only OECD counterpart to dispense with work-incentives tied to tax relief for families. Canada made its child tax credit available in full to all low-income families in 2016. Following the effects of the Covid-19 pandemic lockdown, the United States also enabled its parallel child tax credit to be paid in full to all low-income families who did not meet the standard work test. As a result of dropping the work requirements, the United States' child poverty rate fell during the pandemic. United States President Joe Biden's administration expressed a commitment to making this a permanent change.[150]

In Australia, family tax assistance is indexed with the Consumer Price Index (CPI) in July every year. In New Zealand, the inflation adjustment for the Family Tax Credit is meant to occur when cumulative inflation passes five percent. However, there is no obligation on policymakers to adjust for inflation.[151] Meanwhile, prices continue to rise faster than ever in New Zealand, with inflation currently sitting at approximately seven percent.[152] The Australian system also has a lower rate of abatement at low income levels.[153]

The child poverty rate in New Zealand is 30–40 percent higher than Australia's.[154] Admittedly however, Australia's family tax assistance scheme does not work in isolation to produce this result. Australia has a comprehensive

149 Neuwelt-Kearns and St John, above n 18.
150 St John, above n 19.
151 Neuwelt-Kearns and St John, above n 18.
152 Stats NZ "Annual inflation at 7.2 percent" (18 October 2022) <www.stats.govt.nz>.
153 Neuwelt-Kearns and St John, above n 18.
154 CPAG "New research: Australia supports children in families on benefits better than New Zealand" (2021) CPAG <www.cpag.org.nz>.

capital gains tax (which New Zealand does not),[155] a tax-free threshold up to AUD 18,200 (NZD 19,700) for Australian residents[156] and a means-tested aged pension.[157] There are certainly measures New Zealand could adopt to alleviate some of the burden on the lowest-income families, yet it seems that New Zealand, unlike Australia, lacks the political will to reform these aspects of the tax system.

B New Zealand Reform

1 Overarching Objective for Reform

Fundamentally, all low-income families should have full access to WFF, irrespective of hours worked or whether the parents are receiving benefits. Eliminating the discriminatory aspects of the scheme would be an important and highly targeted change that would align with child poverty reduction goals. This is similar to measures taken by other OECD countries, such as those mentioned above, who have now abandoned work incentives in the tax assistance schemes that are aimed towards families with children. This change is justified by adherence to principles of fairness and need, but it has not yet been possible due to the persistence of entrenched biases against beneficiaries. These biases were amplified during the Rogernomics era. This article will now break down how this change could be implemented in the future, in order to achieve the best outcomes possible.

2 Long-term Reform

In order to allow all low-income families full access to WFF in a manner that achieves the objectives of the scheme, as have been considered by this article, there are four long-term steps that should be taken:

i) implementing a tax-free income threshold;
ii) joining the In Work Tax Credit with the Family Tax Credit and making the Guaranteed Minimum Family Income available to all low-income families;
iii) adjusting WFF annually for inflation; and
iv) reducing the WFF abatement rate.

155 (27 May 2004) 617 NZPD 13385 (Budget Statement – Budget Debate, Procedure, Michael Cullen) at 13394.
156 Australian Taxation Office "New to tax and super" (2023) <www.ato.gov.au>.
157 Services Australia "Income test" (20 September 2023) <www.servicesaustralia.gov.au>.

First, the New Zealand Government could consider implementing a tax-free income threshold, which Australia, France and the United Kingdom have already done.[158] New Zealand is an outlier among other OECD countries in this respect. Implementing a tax-free threshold of $14,000 would give workers an extra $1470 per year. This would be a clear step towards achieving the Government's objective of incentivising work to increase productivity and opportunities for New Zealanders. Craig Renney, the Economist and Director of Policy for the Council of Trade Unions, said that this threshold incentivises parents in low-income households to work extra hours because earners would be taking home all of their income. Administering "Working for Families or tax credit systems" would be much simpler,[159] and Working for Families and tax credit schemes "would allow more relief to be delivered to where it will have the most impact".[160]

Second, the In Work Tax Credit should be joined with the Family Tax Credit and the Guaranteed Minimum Family Income should be made available to all low-income families. The New Zealand Initiative Chief Economist, Dr Eric Crampton, claimed that while there will never be the perfect solution with no trade-off, joining the In Work Tax Credit with the Family Tax Credit would be the most cost-effective way of substantially reducing child poverty in the worst-off families in the long-term. This would target families well below the abatement level, somewhat alleviating the inefficiencies from high EMTRs.[161] Susan St John from the Child Poverty Action Group agreed with Crampton. She argued that the first step is to abandon the outdated In Work Tax Credit. The estimated cost of the In Work Tax Credit, approximately $600 million, could be put towards the Family Tax Credit in order to target the lowest income families.[162] The Guaranteed Minimum Family Income should also be available to all low-income families regardless of employment status, similar to Australia.

This cost of doing so would be comparatively small when compared against the $17.89 billion per annum spent on superannuation. As a result,

158 The UK has a "personal allowance" of around NZD 24,203 per year before they start paying income tax and in France individuals can earn NZD 17,267 before being taxed: Susan Edmunds "'Time for a tax-free threshold': Should we have low-income earners a break?" *Stuff* (online ed, 16 November 2022).

159 Edmunds, above n 158.

160 Edmunds, above n 158.

161 Crampton, above n 128.

162 St John, above n 19.

middle-income families would be no worse off because their loss of In Work Tax Credits would be counter-balanced by a gain in the Family Tax Credit.[163] Having the Family Tax Credit as the primary credit given to caregivers would make the system much simpler to operate. Not only would there be fewer separate credits to administer, but resources and funds dedicated to ensuring that work hour requirements are being met, would be saved. This would shift the scheme away from the work-incentive ideology of Rogernomics. Women would especially benefit from such changes, as solo mothers would no longer be indirectly discriminated against, as they would be able to receive the full amount of tax relief.

Third, WFF should be adjusted for inflation annually, like the Australian system. This is particularly crucial to ensure adequate living standards for low-income families at a time when New Zealand continues to experience high inflation, at six percent as of June 2023.[164] Fourth, WFF should be wage-indexed, similar to NZS, as wage growth also constantly erodes its value. In November 2022, wage inflation was approximately 3.7 percent.[165] Currently, the WFF package is adjusted on an ad hoc basis, and thus constantly decreases in value. The Families Package in 2018 was promoted to New Zealanders as a generous policy,[166] despite being an inflation catch-up.

Finally, the rate of abatement should be reduced from 27 percent to the previous 20 percent. This would reduce inefficiencies by easing EMTRs at the threshold levels and reducing the disproportionate EMTRs for secondary income earners whose incomes are compounded on top of their partners once they go back to work. This would mitigate the disincentives to engage in extra hours of work, especially for partnered women. The abatement rate has only been increased to offset the increase in the Family Tax Credit, and the Family Tax Credit was simply increased as an inflation catch-up.[167] Having a lower abatement rate would therefore not cost the Government more than when the credit was originally introduced. The adoption of a lower abatement rate would incentivise the uptake of paid work because people will see that

163 St John, above n 19.

164 Corazon Miller "Inflation rate falls: New figures show economy cooling" *1News* (online ed, 19 July 2023) <www.1news.co.nz>.

165 Stats NZ "Annual wage inflation rises to 3.4 percent" (3 August 2022) <www.stats.govt.nz>.

166 New Zealand Government | Te Kāwanatanga o Aotearoa "Wellbeing Budget 2022: A Secure Future" (19 May 2022) <https://budget.govt.nz>.

167 St John, above n 19.

they are taking home more of their income. If the Government wants to encourage work and in turn, economic growth, this would be a clear step in the right direction.

However discriminatory the current family assistance package may be, the Court of Appeal has made it clear that it will leave this policy issue to Parliament, as it has a broad range of social, economic, fiscal and tax ramifications. This means that, ultimately, it is up to public pressure to drive reform.[168] The public needs to urge the Government to consider implementing the changes discussed above, and to learn from countries such as Australia, to finally make an evidence-based effort at breaking the intergenerational cycle of poverty that New Zealand has faced for decades.

VI CONCLUSION

New Zealand, the former "model welfare state", is now criticised internationally for its rates of child poverty. The neoliberal ideology that is pushed in modern society has excused policies that unjustly discriminate against the poorest children and reinforce the poverty cycle. Those who have the ability to find work or who have a partner who works, are rewarded for being able to contribute to society, ironically by alleviating a greater percentage of their tax obligations.

WFF is the result of the free-market ideology and aims to 'make work pay' for New Zealanders. WFF discriminates against beneficiaries more harshly than Australia, Canada, and (at least, at present) the United States. This discrimination breaches New Zealand's international obligations to uphold the rights of children. The WFF package is inequitable in accordance with both vertical equity and horizontal equity criterion. In addition, WFF is inefficient due to the high EMTRs that disincentivise caregivers to work extra hours. It may also encourage dual-income families to become single-income families.

Reform in this area is no easy feat. But there are changes that can be made. New Zealand should abandon the In Work Tax Credit, and the estimated $600 million saved could be injected into the Family Tax Credit for all low-income families. Additionally, abatement rates should be reduced to the previous rate of 20 percent. The Family Tax Credit should be indexed with the CPI, to ensure a good standard of living for all children in times of high inflation.

168 *Child Poverty Action Group Incorporated v Attorney-General*, above n 12.

The ideology that reinforces "self-responsibility" is over-simplified and ignores important socio-cultural factors in New Zealand's history. Work-incentive schemes wrongly assume that available work is accessible to those who want it. Ultimately, work incentives punish the most deprived children, who are treated as a burden, and places their health, wellbeing and the future prosperity of the country, at risk. One cannot continue doing the same things whilst expecting drastically different outcomes. By looking at the evidence in front of us, and by leading with the empathy that New Zealanders pride ourselves on, we must finally acknowledge that change is needed in order to tackle child poverty.

"VISAS OF LAST RESORT": THE EFFICACY OF THE VICTIMS OF FAMILY VIOLENCE VISA SCHEME IN UPHOLDING INTERNATIONAL LAW

Abby Jones*

Migrant communities experience more intense vulnerabilities to family violence yet remain some of the least protected and supported by the law. One method of legal protection for this community is the Victims of Family Violence (VFV) visa scheme. This article describes the operation of these visas, and analyses how they inadequately protect the migrant community in Aotearoa New Zealand from family violence by examining case law from Immigration and Protection Tribunal (IPT) appeals. This allows for an analysis of the inadequacies of these visas in light of their objective to assist Aotearoa New Zealand to meet its international law obligations, based off the concerns raised by the Committee on the Elimination of Discrimination against Women in its 2018 report reviewing the VFV scheme's compliance with international law. This article then proposes possible changes and additions to promote the incorporation and affirmation of these international law standards within the visa scheme, to improve outcomes for applicants and migrant victim-survivors of family violence in Aotearoa New Zealand.

I INTRODUCTION

One of Aotearoa New Zealand's darkest shames is its rate of family violence, the highest rate in the OECD.[1] Migrant communities experience more intense vulnerabilities to family violence and yet remain some of the least protected and supported by the law. One method of legal protection for these communities is the VFV visa scheme.

The scheme is set out to assist New Zealand to meet specific international obligations under two international human rights treaties: the United Nations

* Recent BA/LLB graduate of Te Herenga Waka — Victoria University of Wellington. The author (she/her) would like to thank Dr Marnie Lloyd, her supervisor for this article, along with the former and present Community Law Wellington and Hutt Valley Refugee and Immigration Legal Advice Service staff members

1 Immigration New Zealand *Recent Migrant Victims of Family Violence Project 2019: Final Report* (Ministry of Business, Innovation & Employment, 2019) at 5.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Convention on the Rights of the Child (CRC). However, it is clear this scheme is not meeting the needs of the vulnerable migrant community, to the extent that the scheme is referred to as "visas of last resort" by professionals working in this space.[2]

II FAMILY VIOLENCE AND MIGRATION

While individuals from all walks of life experience family violence, migrants experience different and unique vulnerabilities as victims of family violence in a foreign country. An uncertain immigration status can make individuals especially vulnerable to abuse.[3]

A Immigration and Partnerships

1 Function of the Immigration System

Every person who is not a citizen and who wishes to enter or remain in New Zealand must obtain a temporary entry or residence class visa, after meeting the requirements laid out under the Immigration Act 2009 and the Immigration Instructions.[4] It is usually Immigration Officers acting under the delegation of the Minister of Immigration who decide to grant or decline permits.[5] While there is no right to appeal a declined temporary entry visa application, persons who are declined a residence visa can appeal to the IPT (formerly known as the Residence Review Board).[6]

2 Partnership Visas

For many migrants, their ability to remain in New Zealand is dependent on a partner.[7] Migrants can be sponsored by their partner under a Temporary-Entry Partnership Visitor Visa or an Indefinite Partnership Residency Visa.[8] These

2 At 27.
3 Irene Ayallo "Intersections of immigration law and family violence: Exploring barriers for ethnic migrant and refugee background women" (2021) 33(4) Aotearoa New Zealand Social Work Journal 55 at 63.
4 Immigration Act 2009, ss 14 and 22.
5 Sections 380 and 389.
6 Sarah Croskery-Hewitt *Fighting or Facilitating Family Violence? Immigration Policy and Family Violence in New Zealand* (The Michael and Suzanne Borrin Foundation, Wellington, 2023) at 17.
7 Immigration New Zealand, above n 1, at 7.
8 Immigration New Zealand "Operational Manual" <www.immigration.govt.nz> at V3.15 and F2.

visas allow persons living in a "genuine and stable" partnership with an New Zealand citizen or resident to migrate to live with them.[9]

Alternatively, a migrant may be the secondary applicant in another visa application where their partner is the primary applicant.[10] That migrant will not meet the criteria for a visa themselves, and will receive a visa based on their partnership, like a Partner of a Worker Work Visa.[11]

However, it is possible for an individual to come to New Zealand on a visa in their own right — like a student visa — and subsequently apply for a temporary entry or residence class partnership visa based on their relationship with a resident or citizen partner they have met in New Zealand.

B Immigration as a Tool of Abuse

The risk of family violence increases significantly where there is a serious imbalance of power in a relationship, and where the inherent exclusionary nature of the immigration system places individuals in a hierarchical system.[12] Migrants on partnership visas are deeply vulnerable and face the most significant insecurities, given their strong reliance on their partner's continued support.

Politically, migrants are valued for what they can bring to New Zealand: their money, skills and labour.[13] These criteria are governed by patriarchal capitalist values — migrants who can contribute financially are considered valuable, while unpaid domestic labour (most often undertaken by women) is often considered to provide no value from an immigration standpoint.[14] This is reflected in the proportion of women who obtained New Zealand Residency under the Skilled Migrant and Work to Residence categories between 2017 and 2021 (42 percent and 24 percent respectively).[15] In comparison, women made up 66 percent of successful Partnership Residency applications. This institutional oppression is also a compounding issue for women — especially those from less developed nations — who may face heightened barriers to education, employment and financial resources that would make them more

9 At F2.5 and V3.15.
10 At F2.5d.
11 At WF3.1(a).
12 Catherine Briddick "When Does Migration Law Discriminate Against Women?" (2021) 115 AJIL 356 at 357.
13 Croskery-Hewitt, above n 6, at 18.
14 At 18.
15 At 18.

"valuable" migrants.[16] Therefore, the nature of the immigration system allows for the further subjugation and exploitation of women and other people who are reliant on a partner to remain in New Zealand.

Sponsoring partners can exploit the power they have over their sponsored partner, using this hierarchy as a tool to enable other physical, emotional, financial and psychological abuse, or "immigration abuse".[17] Immigration abuse is a unique form of abuse characterised by the use of someone's insecure immigration status to control, exploit or otherwise abuse them.[18] Further, the dependency of individuals on a partner is a barrier to those individuals being able to leave a situation of family violence.[19]

A sponsoring partner can force a migrant to remain on an insecure temporary visa by refusing to sponsor them for a residence class visa.[20] This would restrict the migrant's ability to access a wide range of social services, including employment, social security benefits, social housing, healthcare, childcare and education.[21]

Further, a sponsoring partner may threaten to report a victim-survivor to authorities if they attempt to leave the relationship or seek help or assistance in situations of abuse.[22] As stated, it is a requirement for partnership visas that a relationship be "genuine and stable".[23] A party reporting that the relationship has ended, the partners have separated or even that there is abuse in the relationship will lead Immigration New Zealand (INZ) to conclude that the relationship is unstable.[24] If this occurs, the application will be declined, possibly leaving the individual without a valid visa, unlawfully in New Zealand and liable for deportation.[25] In some cases Immigration Officers will make adverse character findings against people experiencing family violence on the basis that they did not actively disclose their abuse, and had previously

16 At 18.
17 Immigration New Zealand, above n 1, at 7.
18 Electronic Immigration Network "Domestic Abuse Commissioner recognises 'immigration abuse' as a particular form of abuse and calls for its definition to be integrated into all relevant policy and guidance" (29 October 2021) <www.ein.org.uk>.
19 Croskery-Hewitt, above n 6, at 7.
20 Immigration New Zealand, above n 1, at 7.
21 At 7.
22 Ayallo, above n 3, at 57.
23 Immigration New Zealand Operational Manual, above n 8, at F2.5a and WF2a.
24 Croskery-Hewitt, above n 6, at 19.
25 Immigration New Zealand Operational Manual, above n 8, at F2.5(d)(ii).

concealed it from INZ. These people will be prevented from obtaining a visa on the grounds that they are not of "good character".[26]

Additionally, the sponsoring partner can remove a sponsored partner or child from the application at any stage. The threat of this is a form of abuse.[27] In cases where there is a citizen or resident child, the abusive partner may use the threat of reporting and causing the deportation of the victimised partner — separating them from their child — as a form of abuse and control.[28]

For many people, losing their right to remain in New Zealand means returning to a country where they are at risk of returning to poverty and further violence.[29] This presents an obvious barrier to being able to separate from a sponsoring partner who is using violence against them.[30]

The complexities and inaccessibility of the immigration system compounds victims' difficulties in seeking help and reporting abuse.[31] The specific nature of immigration abuse along with the language and cultural challenges migrants experience can prohibit the victim from receiving effective support, and can create intersectional vulnerabilities for victims of abuse.[32] Understanding this context is essential to understanding the precarity of those on insecure visas in New Zealand, especially when these visas are tied to another (abusive) person.

III VISAS FOR VICTIMS OF FAMILY VIOLENCE

A History of the Victims of Family Violence Scheme

In 2000, the Ministry of Social Development began to recognise the vulnerability of individuals who came to New Zealand in good faith to marry or seek residency based on a partnership, and who then suffered family violence.[33] At the time, the Residency Instructions required people sponsored by their partners to remain in the relationship until a two-year "relationship probation" period finished or they would become unlawful and immediately be liable for deportation. This requirement forced people to remain in abusive

26 Croskery-Hewitt, above n 6, at 19.
27 Ayallo, above n 3, at 57.
28 Immigration New Zealand, above n 1, at 7.
29 Croskery-Hewitt, above n 6, at 13.
30 At 13.
31 See at 27.
32 At 15.
33 Ministerial Proposal "Guidelines for Granting Work Permits to Victims of Domestic Violence" (18 August 2000) CAB 00/004787 at 4 (obtained under an Official Information Act 1982 request to the Department of the Prime Minister and Cabinet).

relationships for the probation period to ensure they were not removed from New Zealand and potentially separated from their children.

1 The Initial Scheme

The VFV scheme — previously known as the Victims of Domestic Violence visa — first commenced in 2000 through an amendment to the Special Needs Grant Welfare Programme, to provide public funding to migrants getting back on their feet after leaving an abusive relationship with a New Zealand citizen.[34] When this change was implemented, a Special Work Visa was created to support people who came to New Zealand in good faith to marry or live permanently with a citizen and who had to separate due to family violence before they could gain residence in their own right.[35]

This visa required the individual to prove they would be prevented from reintegrating with their family or social group in their home country due to social or cultural reasons.[36] Policymakers recognised the variety of personal circumstances of applicants for this visa. Consequently, they noted it may be appropriate to give Immigration Officers discretion to grant visas to individuals who meet the primary objective of the policy — victims of family violence who were unable to return home — but who may not have met the specific relationship or visa status elements of the policy.[37] Granting this discretion allowed Immigration Officers to catch applications which fell outside "the scope … but not the intent" of the policy.[38]

2 Formalisation of the Scheme

This first iteration of the VFV scheme was a time-limited trial programme that ended in 2001.[39] The scheme was then replaced by a two-phase process (first a Special Work Visa, and then a Special Resident Visa) for individuals who were married to a New Zealand citizen, who had to leave their relationship due to

34 Cabinet Paper "Domestic Violence Provision" (July 2001) CAB 01/003702 at [1] (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).

35 Croskery-Hewitt, above n 6, at 19; and Cabinet Paper "Domestic Violence Provision", above n 34, at [10].

36 Ministerial Proposal "Guidelines for Granting Work Permits to Victims of Domestic Violence" (18 August 2000) CAB 00/004787 at Appendix One (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).

37 Cabinet Paper "Domestic Violence Provision", above n 34, at [16].

38 At [16].

39 At [1].

family violence and who did not have a secure visa status in their own right.[40] This resembles the current scheme.

The discretion granted to Immigration Officers under the previous iteration was removed and the threshold for "not being able to return home" was raised significantly. Applicants needed to prove that if they returned to their home country, they would be *disowned* by their family and community as a result of the relationship ending, and would have no means of independent support.[41] Further, Women's Refuge were required to refer all applicants for a visa.[42]

3 Changes to the "Unable to Return Home" Criterion

After more reform in 2008, the "disownment" requirement was lessened to that of a risk of "abuse or exclusion from their communities due to stigma".[43] Further, an "objective" or "purpose" section was added for the VFV residence class visas.[44] The objective section, which remains in force, is to help meet New Zealand's international obligations, particularly in regard to art 16 of CEDAW and art 19 of the CRC.[45] Both of these Conventions have been ratified by New Zealand.[46] Since these reforms, there have been limited changes to the scheme.

B The Current VFV Scheme

Currently, individuals who are on temporary partnership visas and experience family violence within this relationship can apply for Special Policies (Victims of Family Violence) Visas — either a six-month work visa, or an indefinite residence class visa.[47] To be granted either of these visas, the applicant must establish:[48]

40 Cabinet Paper, above n 34, at 2.

41 Ministerial Briefing "Evidence for the Victims of Domestic Violence Policy" (6 December 2006) 06/62985 at [3] (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).

42 Croskery-Hewitt, above n 6, at 4.

43 Cabinet Minute — Social Development Committee "Review of Victims of Domestic Violence Immigration Policy" (9 September 2008) SDC (08) 119 at 3 (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).

44 Cabinet Minute — Social Development Committee "Review of Victims of Domestic Violence Immigration Policy" (10 September 2008) SDC Min (08) 16/6 at 4–5 (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).

45 Immigration New Zealand Operational Manual, above n 8, at S4.5.1(b).

46 United Nations Human Rights Treaty Bodies Database "Ratification Status for New Zealand" <https://tbinternet.ohchr.org>.

47 Ayallo, above n 3, at 57.

48 Immigration New Zealand Operational Manual, above n 8, at WI7.1 and S4.5.2.

i) they were in a relationship with a temporary entry class visa holder, and held a visa based on their relationship with that person; or
ii) they were in a relationship with a New Zealand citizen or residence class visa holder and had intended to seek residence in New Zealand based on the relationship; and
iii) the relationship has ended because of family violence.

The definition of family violence is imported from s 9 of the Family Violence Act 2018.[49] Notably, this definition only includes physical, sexual or psychological abuse. Immigration abuse is not explicitly mentioned. The applicant will need to provide evidence of family violence. This can include:[50]

i) a final Protection Order;
ii) a relevant conviction of family violence against the applicant or a dependent child of the applicant;
iii) evidence of a complaint of family violence made to the New Zealand Police where the Police are satisfied that family violence has occurred; or
iv) a statutory declaration from the applicant stating that family violence has occurred, along with two other statutory declarations from persons competent[51] to make such declarations that family violence has occurred.

Further, an applicant needs to provide evidence they were in a partnership with the temporary visa holder or New Zealand citizen or resident. Evidence of this can include a marriage certificate, birth certificates of children, photographs of the couple, evidence of shared finances or other proof of living together.[52] The applicant also needs to provide evidence they specifically lived together in a family relationship.[53] Although there are many ways that an applicant could demonstrate that they are in a family relationship this requirement can simply be met by the applicant making a statutory declaration.

49 At S4.5.5.
50 At S4.5.5 and WI7.5.
51 Competent persons include registered social workers, doctors, nurses, psychologists, counsellors and women's refuge workers acting in their professional capacity: at S4.5.6 and WI7.10.
52 At S4.5.10 and WI7.15.
53 At S4.5.12 and WI7.20.

1 VFV Work Visa Requirements

As an additional criterion for a special work visa under the VFV, the applicant must demonstrate that they need to work in order to support themselves in New Zealand.[54] This is to prove the applicant is in need of such a visa — the short-term work visas are intended to allow individuals to gain a visa status that allows them to work and get back on their feet after leaving an abusive relationship, while providing time (albeit limited) for them to ascertain their desire or capacity to remain in New Zealand.[55] Work visas last for six months.[56] They can be extended to nine months if the individual has applied for residency.

2 VFV Residence Class Visa Requirements

Despite being part of the same visa scheme, the instructions for work and residence class visas under the VFV scheme vary significantly. To be granted a VFV residence class visa, the applicant must meet the evidentiary requirements set out above, while also proving they have the acceptable standard of health needed for any residence class application.[57] Additionally, they must prove they cannot return to their home country because:[58]

i) they would have no means of independent financial support, and have no ability to gain financial support from other sources; or
ii) they would be at risk of abuse or exclusion from their community because of stigma.

No further guidance is provided in the Immigration New Zealand Operational Manual as to how these criteria can be met.

IV INTERNATIONAL LAW

As stated, the introduction of international law into the VFV scheme came in 2008 when the Minister of Immigration and the Ministry for Women's Affairs (now named Ministry for Women) conducted a comprehensive review of the scheme.[59] The incorporation of international law empowers the IPT, faced with

54 At WI7.1(c).
55 Cabinet Paper "Interim Financial Support for Domestic Violence Victims who are Holders of Temporary Work Permits" at [12] (obtained under an Official Information Act request to the Department of the Prime Minister and Cabinet).
56 Immigration New Zealand Operational Manual, above n 8, at WI7.35(a).
57 At S4.5.2 and A4.
58 At S4.5.2(d).
59 Croskery-Hewitt, above n 6, at 22.

difficult or marginal cases, to look at the wider purpose of the scheme to help make its decisions.[60]

The "objective" statement sets out that the VFV scheme is designed to meet New Zealand's international obligations to:[61]

> i. end discrimination against women in all matters related to marriage and family relations (Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women); and
>
> ii. protect children from mental and physical violence (Article 19 of the United Nations Convention on the Rights of the Child).

Article 16 of CEDAW provides a list of protections for individuals in marriages, including the right to freely enter into marriage and the right to choose the spacing of children. Article 19(1) of the CRC much more broadly specifies that:[62]

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

A United Nations Committees' Feedback Regarding the VFV Scheme's Compliance with International Law

1 Committee on the Elimination of Discrimination Against Women

The current gaps in the VFV in relation to New Zealand's obligations under CEDAW are clear to see. Any state that ratifies CEDAW — as New Zealand has — is required to provide periodic reports outlining steps taken to comply with CEDAW to a monitoring committee (the CEDAW Committee).[63] The CEDAW Committee then provides feedback and outlines further areas of concern the state should take steps to improve.[64]

60 Neville Robertson and others *Living at the Cutting Edge: Women's Experiences of Protection Orders Volume 1: The Women's Stories* (University of Waikato, 2007) at xxv.

61 Immigration New Zealand Operational Manual, above n 8, at S4.5.1.

62 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC], art 19(1).

63 Immigration New Zealand, above n 2, at 16.

64 At 16.

In 2018, New Zealand's feedback report specifically noted several concerns regarding the appropriateness of the current VFV scheme to meet international obligations under CEDAW.[65] The Committee was concerned that the scheme:[66]

i) Facilitates women to remain in abusive relationships where they are dependent on the abusive partner to remain lawfully in New Zealand.
ii) Does not adequately protect women who have separated from their partner due to abuse, especially those who are then deported or returned to their country of origin, leaving the children with the abusive parent.
iii) Does not sufficiently recognise that women in these situations face particular obstacles to access to justice for a variety of reasons relating to lack of knowledge and language barriers, as well as a lack of eligibility for legal aid.

The CEDAW Committee made several recommendations on the VFV scheme based on its concerns.[67] These included revising the immigration system, with a view to facilitating access to residence class permits for mothers of New Zealand citizen children, and creating adequate conditions for migrant women to make complaints, including "by ensuring that they are properly informed of their rights, and available remedies".[68]

2 Committee on the Rights of the Child

The CRC, like CEDAW, has a reporting requirement — to the Committee on the Rights of the Child — but there have never been any references to the VFV scheme in any of New Zealand's reporting to this body. Nevertheless, it is clear there are issues with how well the VFV scheme fits New Zealand's obligations under the CRC.

V ANALYSIS OF THE VFV SCHEME

While the VFV scheme is touted as a way for New Zealand to meet its international obligations in respect of women and children, the CEDAW

65 Committee on the Elimination of Discrimination against Women "Concluding observations on the eighth periodic report of New Zealand" CEDAW/C/NZL/8 (25 July 2018) [CEDAW Committee Report], as cited in Immigration New Zealand, above n 1, at 16.
66 At 14.
67 At 14–15.
68 At 15.

Committee's review demonstrates that the VFV scheme is deeply inaccessible to most migrants, so much so that VFV visas have been referred to as "visas of last resort", and acts in a number of ways to continue the perpetration of family violence within migrant communities.[69] Looking further at the practical implementation of this scheme by INZ and the IPT demonstrates the extent to which it is in breach of international obligations.

A Inaccessibility

The process of applying for a VFV visa is complex.[70] Many applicants will require the assistance of a lawyer or other legal services to apply, or even to uncover the existence of these visas.[71] However, unlike asylum seekers, migrants applying for VFV visas are ineligible for legal aid. This means that they are unable to obtain legal assistance without securing pro bono legal support from a Community Law Centre or other organisation, or paying for private legal support.[72] Further, applicants and their counsel have to combat the highly-resourced INZ, which not only have its own counsel, but also a Country Research Unit that supplies Immigration Officers with generic research on the status of women in the applicant's home country. The applicant must rebut this successfully.[73] This resourcing imbalance can seem insurmountable and can discourage people in situations of family violence from attempting to leave; the chance of success is so minimal. This confirms that a lack of access to justice is a significant concern, as raised by CEDAW in respect of the scheme's compliance with the Convention in its 2018 report.[74]

B Challenges Posed by Evidential Requirements

As outlined, the VFV scheme imposes an evidential onus on individuals, who must prove that they have suffered family violence. Most applicants under the VFV are ethnic women from non-Western nations.[75] The evidentiary requirements pose serious challenges for migrant individuals, who may not be able to obtain appropriate evidence of family violence due to their unique

69 Immigration New Zealand, above n 1, at 27.
70 Ayallo, above n 3, at 62.
71 At 62.
72 Immigration New Zealand, above n 1, at 27.
73 Croskery-Hewitt, above n 6, at 24.
74 CEDAW Committee Report, above n 66, at 14.
75 Croskery-Hewitt, above n 6, at 33.

cultural and personal situations.[76] This confirms the third concern raised by the CEDAW Committee, that women in these situations are uniquely vulnerable due to language barriers and cultural issues.

Police reports, criminal charges or Protection Orders may not have been sought by applicants due to cultural differences and norms surrounding the disclosure of family violence, and therefore cannot be provided as evidence of family violence for a VFV visa application. For example, in *Residence Appeal No 15643*, the applicant's ex-partner had been convicted of sexual offending against her, but the convictions were not considered appropriate evidence for the visa application by INZ as they were not a complaint or conviction of family violence.[77]

To be accepted, the evidence must be a formal report or communication of family violence. But in reality, even in non-migrant communities in New Zealand, around 76 percent of family violence goes unreported.[78] The requirements pose a more significant barrier to the migrant community, as reports show migrant ethnic communities report family violence at comparatively lower rates than the general population.[79] The lack of recognition for the practical realities and intricacies of family violence in migrant communities means that the scheme's criteria harm the migrant communities that it is meant to protect.

The decision in *Residence Appeal No 15903* highlights the discord between the scheme's evidentiary requirements and cultural differences in migrant communities.[80] In that case, an applicant from the Philippines had experienced months of mental abuse and violent physical abuse since moving to New Zealand on a temporary partnership visa, dependent on her husband.[81] After she had applied for a residence class visa, her husband sent INZ a letter withdrawing his support for her residency application.[82] She then applied for a VFV residency visa.[83] The applicant did not report the abuse to the New Zealand Police due to negative experiences with police in the Philippines, so there were no police records or Protection Orders that could be provided as

76 Ayallo, above n 3, at 62.
77 *Residence Appeal No 15643* [2008] Residence Review Board 15643 at [22].
78 Immigration New Zealand, above n 1, at 5.
79 Ayallo, above n 3, at 61.
80 *Residence Appeal No 15903* [2008] Residence Review Board 15903.
81 At [3] and [7]–[10].
82 At [5].
83 At [11].

evidence of abuse in the relationship.[84] Further, as her husband attended her medical appointments, she could not inform her doctor of her abuse.[85] This meant her doctor was also unable to provide a statutory declaration in support of her application. She was unable to seek independent medical support due to a lack of financial support from her husband.[86] She was also unaware of organisations like Women's Refuge.[87] Therefore, it was virtually impossible for her to prove family violence had occurred. While noting the applicant's evidence that she would be returning to live in poverty, the Residence Review Board declined her appeal.[88]

Compounding the above evidentiary issues are the practical challenges of meeting the evidentiary requirements. For example, the cost of seeking a Protection Order and the difficulties with contacting someone who is able to provide evidence that family violence has occurred, contacting police and conducting medical checks for evidence of family violence.[89] Immigration abuse is also not recognised as family violence for the purposes of seeking a Protection Order.[90]

These insurmountable challenges — high evidentiary requirements, and a lack of cultural competency and awareness of the institutional challenges faced by migrants in New Zealand on behalf of INZ and the IPT — can discourage individuals from leaving situations of family violence. This is highlighted in the concerns raised by the CEDAW Committee in its 2018 review. With these challenges in mind, it is difficult to see how the VFV scheme upholds international law in its current form.

C Proving an "Inability to Return Home"

The additional requirement for the VFV residence class visa of proving an inability to return home creates a higher threshold than for the VFV work visa. This requirement has been the central issue in 80 percent of IPT appeals against the decision to decline a VFV residence class visa.[91] Therefore, it is clearly a source of significant contention in terms of the implementation of the policy.

84 At [44].
85 At [17].
86 At [45].
87 At [45].
88 At [58].
89 Croskery-Hewitt, above n 6, at 66.
90 At 27.
91 At 7.

The high threshold is likely intended to limit those who receive residence class visas due to the significant number of benefits that residents get in New Zealand.[92] The criteria are not easily met or designed to be widely accessible, with the Residence Review Board stating in *Residence Appeal No 15878* that "it is unrealistic to expect the New Zealand government to come to a separated spouse's aid in all but the most extreme cases".[93] The general purpose of this requirement was outlined in the case of *AR (Victims of Domestic Violence)*:[94]

> The context in which this particular set of instructions applies is one where an applicant has been married in Aotearoa New Zealand and must return alone to her home country, without a male to protect or provide for her and with the new status of a divorced or separated woman … The objective of the instructions is not to ensure an applicant lives in the same socio-economic comfort she may have had before, or during, her marriage. The Victims of Family Violence category is designed to avoid a situation where a woman returns to her home country and is discriminated against there, socially or financially, by reason of her divorced or separated status.

The IPT's narrow approach to this criterion has further reduced the coverage of VFV residence class visas, meaning they are only realistically available to "a small sub-set of migrant-survivors".[95] Only three cases appealed to the IPT found that there had been an error in the assessment of the applicant's ability to return home.[96] This approach is inconsistent with international law standards. It is more likely to result in applicants being returned to their country of origin, where they may face discrimination and abuse, and therefore encourages people to stay in relationships of family violence.

Subsequent case law effectively limits eligibility for these visas to women from a narrow range of countries that INZ perceives as being especially hostile to separated or divorced women.[97] As noted by Sarah Croskery-Hewitt "[a] high degree of specificity is likely to exclude many victim-survivors who would

92 See Ministry of Women's Affairs | Minitatanga Mō Ngā Wāhine *The Status of Women in New Zealand: CEDAW Report — New Zealand's Sixth Report on its Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (March 2006) at 61–62.

93 *Residence Appeal No 15878* [2008] Residence Review Board 15878 at [51].

94 *AR (Victims of Domestic Violence)* [2014] NZIPT 201610 at [29].

95 Croskery-Hewitt, above n 6, at 10.

96 At 37.

97 At 21.

face serious stigma from the protection of the VFV policy".[98] This means that many people are left ineligible and must face significant material hardship and potential removal from their children if they leave a situation of violence.[99]

1 *Stigma*

INZ does not clearly state what is required to show how someone "would be at risk of abuse or exclusion from their community because of stigma".[100] There is no further guidance in the Operational Manual about how an applicant can prove that they would experience stigma. It is unclear whether the stigma must be because they are a victim of family violence, a divorced person or just general stigma.

The proposal developed by the Minister of Immigration and the Ministry for Women's Affairs — when they originally suggested changing the threshold from "disownment" to "stigma" in 2009 — shines little light on the practical implementation of the Immigration Instructions.[101] The Ministries initially proposed that the applicant be required to demonstrate they would be at risk of abuse or exclusion from community participation, rather than showing that they would be disowned upon their return home.[102] The proposal noted that the purpose of the scheme was to prevent a migrant being returned to cultural and community pressures that may provide an unsafe living situation for them.[103] The proposal provided specific situations where the scheme could apply, including when the applicant is unsupported or unable to be supported by their family.[104] It also included situations where an applicant may have no social welfare support, is excluded from having a meaningful community life due to stigma based on their circumstances or where they may be at risk of further abuse should they need to return home.[105]

While we can take some guidance from the proposal, it is generally of limited assistance as the current threshold is higher. Therefore, the clearest guidance that can be sought on the meaning of "stigma" is from appeals made to the IPT. However, the IPT's assessment of "stigma" seems to vary

98 At 65.
99 At 10.
100 Immigration New Zealand Operational Manual, above n 8, at S4.5.2(d)(ii).
101 Cabinet Minute — Social Development Committee (10 September 2008), above n 44, at 6.
102 At 6.
103 At 59.
104 At 54.
105 At 54.

significantly from case to case, creating inconsistency both in INZ practice and across IPT decisions, and giving rise to considerable uncertainty and difficulties for applicants who may be applying for these visas without the support of a lawyer.

The IPT decision of *BG (Victims of Domestic Violence)* stated that for an applicant to "be at risk of abuse or exclusion from their community because of stigma", the stigma must be "directly linked to the domestic violence inflicted on the applicant and their relationship ending as a result".[106] This is not general stigma or stigma because of other circumstances, including the general failing of a marriage.[107] The appellant in this case was concerned the stigma she would experience upon her return home to Fiji with a failed marriage would cause so much stress for her mother it would exacerbate her ill health, but the IPT determined this was irrelevant to the consideration of whether she was able to return home or not.[108]

Guidance also comes from the case of *AC (Victims of Domestic Violence)*, which concerned a Fijian Sikh woman who had been married previously and who left her subsequent relationship with a New Zealand resident after two years of abuse.[109] Her application for a VFV residence class visa was declined as INZ did not believe she would experience stigma if she returned to Fiji.[110] She then appealed to the IPT.[111] She outlined the stigma and gossip she had experienced within her community after the end of her first marriage, and was concerned the abuse would continue after the end of another failed marriage.[112] However, the IPT said the appellant had not established that she would be disowned or left without any means of support.[113] Additionally, the IPT indicated that the stigma must be specific to the appellant. While it acknowledged that gender inequality exists in Fiji Indian society, it considered this was insufficient to "establish that [the appellant] would be stigmatised, disowned, or left without financial support upon her return".[114] This case

106 *BG (Victims of Domestic Violence)* [2019] NZIPT 205202 at [42].
107 At [42].
108 At [42].
109 *AC (Victims of Domestic Violence)* [2012] NZIPT 200464 at [4]–[6].
110 At [17].
111 At [20].
112 At [13].
113 At [29].
114 At [33].

indicates that while the threshold was lowered in 2009, it is still close to the requirement of being disowned.

In *BC (Victims of Domestic Violence)*, exclusion by previous social circles and threats to the appellant's family were not considered to be sufficient stigma or abuse.[115] This was despite the fact that harassment from the appellant's ex-partner's family had led to her family filing a complaint with police in India, and this abuse could become physical upon her return home to India. While this situation would likely leave her open to further abuse if she were to return home, the IPT considered that the threats and exclusion were not sufficient to show a risk of abuse or exclusion because of stigma.[116] However, this analysis takes place within a Western, individualist model of community and society. In many collectivistic non-Western cultures, marriage is central to a woman or person's identity and social status, and "gossip" can have a great impact and effect on an individual's wellbeing and place in their community.[117]

Furthermore, if the appellant faced social discrimination before they came to New Zealand and would face the same, but not worse, discrimination when they returned, then they would still not meet the threshold for stigma.[118] The appellant in *Residence Appeal No 15938* had already experienced stigma as a divorced woman in Fiji and would be returning to the same stigma after her second failed marriage.[119] Therefore, the Residence Review Board considered she would be able to return home, despite knowing she would inevitably experience discrimination.

One serious limitation on the definition of "stigma" from case law comes from *AY (Victims of Domestic Violence),* where the applicant was a citizen of the United States. This case includes the notable statement:[120]

> When her relationship ended, the appellant misguidedly applied for residence under the Victims of Domestic Violence category, which is not designed for women from first-world nations with cultures and laws upholding equal opportunity for women, whatever their relationship status.

115 *BC (Victims of Domestic Violence)* [2017] NZIPT 203941 at [10] and [18].
116 At [54]–[56].
117 Croskery-Hewitt, above n 6, at 60.
118 *Residence Appeal No 15938* [2008] Residence Review Board 15938 at [45].
119 At [45].
120 *AY (Victims of Domestic Violence)* [2016] NZIPT 203384 at [59].

This statement effectively eliminates the applicability of this visa scheme to any woman from a first-world nation, or any other nation with cultures and laws that provide protection to women, by implying it would be impossible for them to experience abuse or exclusion.

This was reiterated in *BV (Domestic Violence)*, which concerned a woman from the United Kingdom.[121] The IPT considered that as England is a "developed country", there would be a low risk of societal or government discrimination against women or people experiencing family violence and there are robust protections for political rights and civil liberties.[122] This effectively excludes all people from "developed" countries, regardless of personal circumstance, from applying for these visas.

Further, in *CB (Victims of Family Violence)*, which concerned a Canadian appellant, the IPT stated that as the Canadian government had put in place mechanisms to prevent family violence and support victims, the appellant was not likely to be at risk of abuse of exclusion from her community because of stigma.[123] This implies that the IPT believes there can be can be no stigma for separated women or victims of family violence in countries where there are governmental mechanisms for protecting victims of family violence. However, this logic does not stretch far — for example, Fiji has ratified CEDAW,[124] yet remains one of the most common origin countries for VFV visa applicants.[125] New Zealand is also a signatory to CEDAW and yet has the highest rate of family violence in the OECD. Therefore, even if a state has mechanisms in place to reduce family violence, this does not automatically mean it does not occur in its communities.

While these cases provide some useful explanations, it is still unclear what exactly constitutes "stigma" for the purposes of VFV visas, especially given that Immigration Officers and the IPT are not bound by precedent. Any application requires the individual to effectively demonstrate "the extent of indignity she [would] suffer in her home country to be eligible for residence under the special domestic violence policy", which can be retraumatising for

121 *BV (Domestic Violence)* [2020] NZIPT 205672 at [1].
122 At [17] and [39].
123 *CB (Victims of Family Violence)* [2021] NZIPT 206350 at [28].
124 Fiji Women's Rights Movement "CEDAW Monitoring and Implementation" (2018) <www.fwrm.org.fj>.
125 Ayallo, above n 3, at 59.

the applicant.[126] The individual must show their culture, country and religion in a bad light, because of the violence the individual's partner has inflicted on them and to ensure their own safety and security.[127]

The levels of proof required for this are difficult to reach — in addition to giving evidence about their family and community, applicants are expected to provide evidence "that goes beyond proof of facts within [their] personal knowledge", including evidence as to the status of women in their country and community.[128] There is also a high expectation of direct written threats of hostility to prove stigma and risk of abuse.[129] The IPT effectively requires these applicants to prove a negative — they must provide conclusive evidence about something that has not happened.[130] For example, INZ considered that the Fijian government having established Women's Refuges in three towns was relevant evidence as to the applicant's likelihood of being disowned by her community.[131]

2 Unable to Financially Support Themselves

The other option applicants have to show they would be unable to return home is proving they would have no independent financial support from employment or other means.[132] However, the IPT has consistently failed to engage with the reality of the employment market and other financial and cultural concerns in applicants' countries of origin. Applicants may face being returned home to insecure financial situations where they may be unable to meet their basic needs.[133]

(a) Individual Support

To analyse whether or not someone would be able to support themselves through employment, IPT cases have looked at the availability of jobs in the applicant's home country. In terms of employment, the IPT has said any job, not just a "favourable" job, would be sufficient employment.[134] It is not sufficient for there to be difficulty finding employment, but it must be

126 Neville Robertson and others *Living at the Cutting Edge: Women's Experiences of Protection Orders Volume 2: What's To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (University of Waikato for the Ministry of Women's Affairs, August 2007) at 230.

127 At 230.

128 At 230–231.

129 Croskery-Hewitt, above n 6, at 71.

130 At 22.

131 Robertson and others, above n 130, at 230.

132 Immigration New Zealand Operational Manual, above n 8, at S4.5.2(d)(i).

133 Croskery-Hewitt, above n 6, at 8.

134 *BC (Victims of Domestic Violence)*, above n 118, at [47].

effectively impossible for the individual to find employment in their home country.[135] This may not always allow individuals to work in their chosen profession, and may confine them to precarious employment. In *BC (Victims of Domestic Violence)*, an Indian woman submitted that she required employment to support herself as her family was unable to provide her financial support.[136] However, because of the high caste of her family, the appellant submitted she would be considered unsuitable for a wider range of employment, highly restricting her employment avenues.[137] Nevertheless, the IPT considered that if the appellant returned to India, she would be able to gain independent financial support from employment or otherwise.[138]

Additionally, if an applicant has higher education or has obtained a university degree it is very rare they will be considered unable to individually support themselves. For example, in the case of *DH (Victims of Domestic Violence)*, the appellant would have no financial support from family members, most of whom were impoverished or unemployed.[139] There was no benefit available to her in Brazil, which was facing an economic crisis.[140] The applicant had a university degree, although she had been working hospitality jobs unrelated to her degree since being in New Zealand.[141] Still, the IPT considered that because there was 80 percent female labour force participation among those with advanced degrees and given the appellant's qualifications and work experience, she had not demonstrated that she would have no means of independent financial support from employment in Brazil.[142] The IPT's approach here is similar to the "better than others" approach taken in *BI (Victims of Domestic Violence)*.[143] In that case, despite the fact the applicant was nearing retirement, and there were serious unemployment issues in her home city in Russia,[144] the fact she had a university degree meant that she had better chances of finding employment than others. Consequently, IPT concluded that she would be able to return home.[145]

135 *BZ (Victims of Family Violence)* [2021] NZIPT 206136 at [30].
136 *BC (Victims of Domestic Violence)*, above n 118, at [22].
137 At [50].
138 At [57].
139 *DH (Victims of Domestic Violence)* [2019] NZIPT 205107 at [29].
140 At [21] and [30].
141 At [32].
142 At [34].
143 *BI (Victims of Domestic Violence)* [2019] NZIPT 205151.
144 At [19]–[20].
145 At [49].

Moreover, the Residence Review Board has found that if an individual experienced economic hardship before they came to New Zealand and would face the same economic challenges when they returned home, they are able to financially support themselves as they have survived those circumstances before.[146] This was demonstrated in *Residence Appeal No 15938*. The Residence Review Board considered that because the appellant had managed to find paid employment after her first divorce, she would be able to find further jobs to support herself after her second divorce — even though there was a significant period of time between her divorces, meaning the job market and her ability to obtain employment would have been significantly different.[147] This type of analysis may be underpinned by the belief that the applicants are opportunistic and motivated primarily by a desire for a higher standard of living.[148]

(b) Support by "Other Means"

It is also unclear what is meant by "other means". In past decisions, the IPT has looked at an appellant's possible housing situation and the level of funding they may receive from family support or government benefits.[149] The IPT often recommends the appellant seek support from organisations such as Women's Refuges and other charities that provide support to victims of family violence, and considers that this would be considered adequate financial support.[150] In *BS (Victims of Domestic Violence)*, the IPT even suggested an appellant could be returned to South Africa with her three children. This would have been in spite of the significant unemployment rates and lacking entitlements to benefits, because the children may be eligible for fee exemptions that could have reduced the cost of their schooling, or they may have been able to access the public school system.[151] No analysis of the likelihood of these fee exemptions being granted to the children, or the suitability of the public school system, was conducted. Additionally, the IPT often refers to government benefits as a suitable form of financial support. [152]

146 *Residence Appeal No 15938*, above n 121, at [45].
147 At [44].
148 See Croskery-Hewitt, above n 6, at 9.
149 See for example *BZ (Victims of Family Violence)*, above n 140; *BI (Victims of Domestic Violence)*, above n 148; and *BV (Domestic Violence)*, above n 124.
150 *Residence Appeal No 14850* [2006] Residence Review Board 14850 at [26].
151 *BS (Victims of Domestic Violence)* [2020] NZIPT 205585 at [34].
152 *BZ (Victims of Family Violence)*, above n 140, at [30].

The availability of family support is also a common consideration. All 39 IPT appeals that addressed the "inability to return home" criterion "contain[ed] some mention of the availability of family support (or lack thereof)".[153] The IPT presumes an appellant's family is able to adequately support them unless the family has effectively rejected the appellant.[154] Further, the IPT has commented on the apparent wealth of an individual's family as a reason as to why the appellant would be able to support themselves in their home country.

The Residence Review Board in *Residence Appeal No 16144* noted the appellant's 19-year-old daughter would be able to seek employment to support her mother, and this was considered a suitable form of independent financial support.[155] In *Residence Appeal No 15938*, the Residence Review Board considered that given there was sufficient money within the extended family to fund the appellant's mother's frequent travel to New Zealand, there was "probably also room within the collective family finances" to financially support the applicant until she could find employment.[156] Without a thorough analysis of the appellant's family's finances, it is inappropriate to presume that the appellant's family is able to support them. Rebutting the IPT's presumption, by producing evidence that someone will not be financially supported, may require the cooperation of people who have shown they are unwilling to support her.[157]

The IPT has noted in some cases the fact that a family could provide a dowry for their daughters indicates they had the money to financially support them.[158] This assessment demonstrates a lack of cultural awareness. Providing a dowry is important in certain cultures and families may save for years in order to make these payments, viewing them as an investment in their child's future.[159] As such, the ability to pay a dowry is not indicative of the family presently being able to support the applicant. Additionally, in some cases, applicants state that it is their responsibility to look after their parents, not the other way around.[160]

153 Croskery-Hewitt, above n 6, at 46.
154 At 46.
155 *Residence Appeal No 16144* [2009] Residence Review Board 16144 at [49].
156 *Residence Appeal No 15938*, above n 121, at [57].
157 Croskery-Hewitt, above n 6, at 49.
158 *BC (Victims of Domestic Violence)*, above n 118, at [49].
159 Croskery-Hewitt, above n 6, at 52.
160 At 46.

The IPT requires many VFV applicants to be entirely reliant on other people — either their family, social welfare or other organisations — for financial support when they return home. Financial reliance on others leaves room for abuse,[161] and creates a similar situation of vulnerability to the one that the VFV scheme seeks to respond to. Additionally, being reliant on third parties, like the government or charities, for support is inherently risky as there is no guarantee of ongoing support should funds be reprioritised. According to Croskery-Hewitt, none of the 39 decisions (addressing the inability to return home criterion) that were analysed "found that the 'unable to return home' requirement was satisfied, and only three … found there had been an error in INZ's assessment" that warranted a revaluation of the decision.[162] Therefore, the way that this criterion has been interpreted and applied by INZ can cause migrants to be revictimised on their return home.

3 Summary of the "Inability to Return Home" Criterion and its Compliance with International Law

For people who are unable to meet the "inability to return home" criterion, the consequence of fleeing family violence in New Zealand is likely to result in being forced to leave the country.[163] The narrow approach to discrimination and harassment, and the treatment of this as ordinary, goes against international law obligations to end discrimination "in all matters relating to marriage and family relations".[164] This criterion forces individuals who will face other forms of vulnerability and discrimination — including gossip, harassment and financial uncertainty — in their home country to leave New Zealand and return to these environments. The current policy response to violence against migrant women, where they cannot separate from their perpetrator without facing removal from New Zealand, fails to uphold the international obligations cited in the VFV policy. The IPT's approach to the VFV scheme has further limited its already narrow scope in a manner that is contrary to the New Zealand's wider international obligations.[165]

161 See National Domestic and Family Violence Bench Book "Economic and financial abuse" (June 2022) <www.dfvbenchbook.aija.org.au>.

162 Croskery-Hewitt, above n 6, at 71.

163 At 21.

164 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW], art 16(1). See Croskery-Hewitt, above n 6, at 85.

165 Croskery-Hewitt, above n 6, at 125.

Clearly, there are innumerable barriers for migrants facing family violence to access the VFV visa scheme. The implementation of the "inability to return home" criterion by the IPT is often culturally inappropriate and can require applicants to become reliant on others. Therefore, they are placed in situations of vulnerability or in situations where they are unable to meet their basic needs during their attempt to flee family violence. Further, the VFV visa criteria effectively prohibit these visas from being accessed by most migrants, as their application is limited to those who INZ perceives as being appropriately stigmatised. The criteria are not easily met or designed to be widely accessible, with the Residence Review Board stating in *Residence Appeal No 15878* that "it is unrealistic to expect the New Zealand government to come to a separated spouse's aid in all but the most extreme cases".[166] Again, this approach is not in line with international law standards. Instead of protecting people from violence, financial uncertainty, and further victimisation and vulnerability, the scheme only protects people from stigma and hardship in countries that are seen as less progressive than New Zealand.[167] This requirement effectively forces applicants into a situation where they have to contort their applications and experiences in order to satisfy the requirements attached to the status of a refugee. Such requirements include having to establish that you are unable to return home, based on a "well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group".[168]

VI RECOMMENDATIONS

New Zealand has used the VFV scheme as a vehicle to meet its obligations under international law. Further analysis is required to consider how the problems identified may breach specific international law obligations held by New Zealand, beyond the concerns raised by the CEDAW Committee. However, it is clear that there are serious deficiencies in the scheme's response to the challenges faced by migrant victims of family violence. As seen in the CEDAW review from 2018, it is evident that the Committees monitoring compliance with these instruments are concerned about the extent to which the VFV does in fact meet New Zealand's international law obligations.

Therefore, adjustments should be made to the scheme to ensure that it is

166 *Residence Appeal No 15878*, above n 94, at [51].
167 Croskery-Hewitt, above n 6, at 23.
168 At 25.

compliant. First, the "unable to return home" requirement should be removed. Second, the specific international law obligations referred to in the scheme do not sufficiently address the real challenges faced by applicants, in order to give effect to the purpose for which international obligations were incorporated — to be used as an effective source of guidance by decision makers and applicants. Therefore, the scheme may also be improved by adjusting the international instruments included in the purpose section of the Instructions to ensure the best protection for individuals seeking these visas. Additionally, given the complicated process to obtain a visa under this scheme it is important that legal aid support is provided to applicants to ensure that these visas are accessible to those who cannot afford private legal services. Lastly, the scope of these visas should be widened to more effectively include gender-diverse and male applicants.

A Remove the "Inability to Return Home" Requirement

The "inability to return home" criterion has led to an incorrect framing of New Zealand's international obligations that has narrowed the scope of the VFV visas, to the point of them being almost redundant for most migrants. Currently, the "inability to return home" assessment is used only to protect women who face discrimination due to their divorced status.[169] However, the scheme should be refocused to protect women from violence within New Zealand's own borders by providing them a suitable opportunity to leave their violent relationship without risking being removed from the country.[170]

Only providing protection from harassment on the specific ground of stigma stemming from divorced status is nonsensical and forces people who are living in situations of family violence to remain in these relationships in almost all cases, or risk being removed from their lives or children in New Zealand. This risk is not only damaging for women who face stigma due to divorce. Forcing people to face gossip and harassment within their communities (even if it does fall short of disownment), along with forcing individuals into states of vulnerabilities where they are reliant on others or unable to meet their basic needs, perpetuates the discrimination and victimisation of women which the VFV scheme attempts to address.

169 At 57.
170 See 57.

B Increase the Scope of Included International Obligations

As stated previously, the purpose of including international law in the "objective statement" of the Instructions was to ensure people could claim against these rights when they are making applications or appealing decisions. However, no IPT cases concerning VFV appeals have mentioned CEDAW. Arguably, this is because the rights mentioned in CEDAW primarily concern the right to enter freely into marriage, the right to be an equal parent and rights in marriage. This narrow scope of applicable law prevents applicants from effectively utilising international law in the intended way. It does so by leaving out the various other ways applicants would face discrimination if they were forced to return to their country of origin, which Aotearoa New Zealand is obliged to help eliminate. Greater incorporation of international law — beyond just the obligation of ending discrimination in marriage — provides more room for individuals to make arguments to support their application to remain in New Zealand.

The Declaration on the Elimination of Violence Against Women is an addition to the CEDAW framework, which New Zealand ratified in 2000.[171] This Declaration recognises that violence against women is an obstacle to equality, development and peace, as well as a violation of fundamental rights, and highlights that migrant women, minority women and refugee women are especially vulnerable to abuse.[172] Further, in a 2010 publication on the core obligations of states under art 2 of CEDAW, the CEDAW Committee noted that "the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief… [or] caste…".[173]

The Declaration should be incorporated into the VFV scheme to ensure that it provides better protection for migrant women. This would address the scheme's exclusion of the realities of migrant women's experiences of violence and potential harassment or revictimisation in their home countries. It would also provide a wider scope for migrant women to argue their case to remain in New Zealand, beyond just discrimination on the basis of their status as a

171 Ministry of Justice "Constitutional Issues & Human Rights" (19 August 2020) <www.justice.govt.nz>.

172 Declaration on the Elimination of Violence Against Women UN Doc A/RES/48/104 (20 December 1993, adopted 23 February 1994), Preamble.

173 Committee on the Elimination of Discrimination against Women "General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" CEDAW/C/2010/47/GC.2 (9 October 2010) at [18].

divorced woman. As a result, more migrant victims of family violence would be allowed to remain in the country. This wider and more generous scope would allow applicants to feel more confident in their ability to remain in New Zealand, reducing the numbers of those who remain in situations of family violence out of fear they will be separated from their children or forced to return home to situations of violence.

C Make Practical Changes to Improve Accessibility

It is vital that VFV applicants be given access to legal aid to ensure that they are able to access counsel for their visa applications.[174] This would directly address the CEDAW Committee's concern regarding the lack of legal aid provided to applicants, along with greatly improving the accessibility of the VFV visas. This in turn would improve outcomes for applicants and address the Committee's other concerns.

D Recognising New Zealand's Obligations to Male and Gender-Diverse Applicants Under International Law

Notably, there is no mention of male or non-binary victims of family violence in the international law obligations referenced in the VFV policy. It is important to ensure the scheme adequately protects all people who may be affected by family violence, not just women and children. The purpose section of the VFV scheme should be expanded to include male and non-binary victims of family violence, to ensure that they are able to be effectively protected by the scheme.

Around 33 VFV Work Visas[175] and 42 VFV Residence Visas[176] have been granted to men since 2012. Given INZ residence class and work visa application forms do not allow for an individual to select a gender that is not "male" or "female",[177] it is unclear how many applicants may be gender-diverse. Given rates of family violence in queer relationships are much higher than those experienced by individuals in heterosexual relationships (between 57–68

174 See Croskery-Hewitt, above n 6, at 71.

175 Ministry of Business, Innovation and Employment "Migration Data Explorer" <www.mbienz.govt.nz>, W1 Work Decisions by Decision Type and Gender and Application Criteria, WHERE [Decision Type CONTAINS Approved] AND [Gender CONTAINS Male] AND [Application Criteria CONTAINS Victims of Domestic Violence].

176 Found using inputs R1 Residence Decisions by Decision Type and Gender and Application Criteria. WHERE [Application Criteria CONTAINS Victims of Domestic Violence] AND [Gender CONTAINS Male] AND [Decision Type CONTAINS Approved].

177 This can be seen on Immigration New Zealand visa application forms INZ 1000 (Residency Visa) and INZ 1015 (Work Visa).

percent for queer individuals, in comparison to the national average of 29 percent),[178] it is important that the international law obligations of this policy are expanded to ensure all victims of family violence are recognised.

VII CONCLUSION

New Zealand has a number of international obligations which must be considered when making decisions that affect members of the migrant community, women and children. Despite being intended to assist New Zealand in meeting our international obligations under CEDAW and the CRC, the VFV scheme does not effectively protect vulnerable migrant victims of family violence. With this, New Zealand is not meeting its international law obligations. The VFV scheme should be reformed to ensure that it is able to operate effectively to uphold New Zealand's international obligations. Further, the addition of further international law standards that more accurately reflect challenges faced by the migrant community would provide better protection for these communities.

178 New Zealand Family Violence Clearinghouse "New research and reports about violence affecting LGBTTQIA+ people" (26 January 2021) <www.nzfvc.org.nz>.

VICTIM-SURVIVORS OF INTIMATE PARTNER VIOLENCE WHO ARE FORCED TO PARTICIPATE IN CRIMES: ARE THEY TREATED FAIRLY IN THE CRIMINAL LAW?

Julia Tolmie,[1] **Jane Calderwood Norton,**[2] **Denise Wilson**[3] **and Rachel Smith**[4]

Research suggests that a portion of female offenders in Aotearoa New Zealand offend in response to intimate partner violence (IPV) victimisation. It is therefore critical to consider whether coercion because of IPV is adequately accommodated in the criminal justice response to such offending. In this article we examine the law on party liability and the defences of compulsion and duress of circumstances. We suggest that these defences are currently not capable of adequately recognising the coercive circumstances that can result in women offending or being held accountable for their violent male partner's offending by means of the expansive doctrine of party liability. The current law therefore requires urgent reform.

This article is inspired by the authors' involvement in a case in which a woman was charged with, and pleaded guilty to, a number of serious property offences committed by her intimate partner. Her liability was based on the fact that she was present at the scene where he committed the crimes and, on one occasion, she attempted (on his instructions) to get the occupants inside the building to open the door to let him in. He had subjected her to extreme and life-threatening physical violence throughout their relationship, including the use of lethal weapons. She was terrified of him and his associates.

Although women's offending, and particularly their serious offending, is numerically minor when compared to male offending,[5] it is nonetheless

1 Professor of Law at the University of Auckland.
2 Senior Lecturer in Law at the University of Auckland.
3 Associate Dean of Māori Advancement and a Professor in Māori Health at Auckland University of Technology.
4 Lecturer in Violence and Trauma at Auckland University of Technology.
5 For example, there were 7,243 male prisoners and 426 female prisoners in New Zealand as of 31 March 2022: Department of Corrections "Prison facts and statistics – March 2022" <www.corrections.govt.nz>.

important for a number of reasons. First, the disproportionate incarceration of Indigenous peoples in Aotearoa New Zealand is particularly pronounced for women: Māori constitute 53 percent of the male prison population but 66 percent of the female prison population.[6] Second, the response to women's offending, and particularly their incarceration, has a serious ripple effect on their dependent children and communities because of women's caring responsibilities.[7] For wāhine Māori "embedded within whānau contexts",[8] the intergenerational effect of systemic incarceration has a "devastating impact".[9] Third, some of the most concerning discrepancies between the underlying moral wrongness of an offender's criminal behaviour and the gravity of the criminal justice response occur in relation to women who sit at multiple axes of oppression, including race and class.[10] These cases tend to involve wāhine Māori living in precarious circumstances whilst dealing with extreme levels of interpersonal, structural and state violence.[11]

International research suggests that for a proportion of women convicted of crimes (we do not know precisely what proportion), their pathway into

6 Department of Corrections *Wāhine: E Rere Ana Ki te Pae Hou Women's Strategy 2021 – 2025* (2021) at 8.

7 The Department of Corrections' data about women's parenting status is limited to women who were directly caring for a child before entering prison. This is likely to be an underestimate as many women are involved with Oranga Tamariki and may have had children uplifted. Based on research conducted in 2013, Corrections estimates that 29 percent of women in prison have a direct parenting role (a child under 18 living with them) prior to imprisonment: Office of the Inspectorate, Department of Corrections *Thematic Report: The Lived Experience of Women in Prison* (October 2021) at 15. See also Julia Tolmie "Women and the criminal justice system" in Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 295 at 311; and Kailash Bhana and Tessa Hochfeld *Now we have Nothing: Exploring the impact of maternal imprisonment on children whose mothers killed an abusive partner* (Centre for the Study of Violence and Reconciliation, December 2001) at 16.

8 Lily George and Elaine Ngamn "Te Piringa Poho: Healing, Potential and Transformation for *Māori Women*" in Lily George and others (eds) *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 250.

9 Tracey McIntosh and Maja Curcic "Prison as Destiny? Descent or Dissent" in Lily George and others *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 223 at 232.

10 Patricia Hill Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd ed, Routledge, New York, 2000) at 227–229. These axes are located within what Collins terms a matrix of domination — "the overall social organization within which intersecting oppressions originate, develop, and are contained". In Aotearoa New Zealand, settler colonialism is integral to the operation of the matrix of domination.

11 As was the offender in the case that inspired this article. See also *Police v Kawiti* [2000] 1 NZLR 117 (HC); *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010; *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *Wihongi v R* [2012] NZSC 12; *R v Paton* [2013] NZHC 21; and *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

crime,[12] and particularly for "more serious, 'gender atypical'" offending,[13] occurs through relationships with men, and often violent male partners. For example, women can offend in an attempt to cope with, escape or resist victimisation,[14] or they may be coerced into involvement in, or taking the blame for, their partner's offending.[15] The UK Prison Reform Trust states that a key difference between men and women in prison is that family relationships tend to be a protective factor for men, whilst for women relationships are more often a risk factor.[16]

In Aotearoa New Zealand, data provided by the Department of Corrections suggests a high correlation between women's victimisation and their incarceration, with 68 percent of incarcerated women having experienced family violence, and 75 percent having experienced either (or both) family or sexual violence.[17] For many of these women, the abuse commenced when

12 Charlotte Barlow and Sandra Walklate *Coercive Control* (1st ed, Routledge, London, 2022) at 20–22. See also Baroness Jean Corston *The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System* (UK Home Office, March 2007) at 3 and 19.

13 Barlow and Walklate, above n 12, at 20; and Sarah Becker and Jill A McCorkel "The Gender of Criminal Opportunity: The Impact of Male Co-offenders on Women's Crime" (2011) 6 Feminist Criminology 79 at 84 and 99–100.

14 Self-medicating with drugs and using violence in defence or retaliation can be strategies used for coping with, and escaping, violence and abuse. Melissa Dichter and Sue Osthoff observe that "Victimisation can lead to economic strain and limited opportunities for financial independence, leaving women and girls to engage in criminalized activities such as drug sales, commercial sex work, and theft or fraud … Abusive partners may also falsely accuse women of engaging in criminalised activities and manipulate the criminal legal system to have women arrested and incarcerated" in *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update* (National Resource Center on Domestic Violence and the National Online Resource Centre on Violence Against Women, July 2015) at 10.

15 Becky Clarke and Kathryn Chadwick *Stories of Injustice: The Criminalisation of Women Convicted Under Joint Enterprise Laws* (Manchester Metropolitan University, November 2020) at 5. See also Jessica Jacobson, Amy Kirby and Gillian Hunter *Joint Enterprise: Righting a Wrong Turn? Report of an exploratory study* (Prison Reform Trust and Institute for Criminal Policy Research, University of London, 2016) at 2, where the authors note that how often and against whom the law on party liability (and particularly the joint enterprise doctrine, discussed below) is employed remains hidden because data is not kept.

16 UK Prison Reform Trust "*There's a reason we're in trouble" Domestic abuse as a driver to women's offending* (2017) at 3.

17 Department of Corrections, above n 6, at 8. The data on combined family and sexual violence comes from the strategy for 2017–2021 – this includes in the overall percentage, experiences of sexual violence that is not family violence: Department of Corrections *Wahine – E Rere Ana Ki Te Pae Hou: Women's Strategy 2017 – 2021* (June 2017) at 4. Note that 75 percent of incarcerated women are suffering from mental health problems (compared with 61 percent men) and 52 percent from forms of post-traumatic stress disorder (compared with 22 percent of men). A study of incarcerated Indigenous women in Western Australia found that 90.7 percent of those convicted for violence had also been the victims of violence: Mandy Wilson and others "Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia" (2017) SAGE Open 1 at 6.

they were young, and was part of "a sustained period of violence".[18] When conducting research documenting Māori women's experiences of "unsafe relationships", Denise Wilson was informed that some women were forced to engage in illegal activities by their partner, while others committed crimes to be imprisoned for respite from their partner's violence.[19] Māori women in unsafe relationships, who are also living with "social marginalisation, generational social and economic disenfranchisement, ongoing effects of colonisation… [and] racism and discrimination",[20] "know" that their partners will retaliate in response to resistance and, from past experience, that they cannot rely on the family violence system for support.[21] Wilson and others found Māori women utilised compliance, silence, placating and mediating as safety strategies when faced with a partner's demands, including engaging in illegal activities, to actively protect others and prevent further violence.[22]

Given the relevance of women's intimate partner violence victimisation to their offending, it is critical to consider whether it is adequately accommodated in the criminal justice response. In this article we propose to address two criminal law issues raised by the case that inspired it: the law on party liability and the defences of compulsion and duress of circumstances. We suggest that these defences are currently not capable of adequately recognising the coercive circumstances that can result in women offending *or* being held accountable for their violent male partner's offending by means of the expansive doctrine of party liability.

18 Marianne Bevan "New Zealand prisoners' prior exposure to trauma" (2017) Practice: The New Zealand Corrections Journal 8 at 14.

19 Denise Wilson and others *E Tū Wāhine, E Tū Whānau – Māori women keeping safe in unsafe relationships* (Taupua Waiora Māori Health Research Centre, Auckland, 2019). See also Denise Wilson and Melinda Webber *The People's Report: The People's Inquiry into Addressing Child Abuse and Domestic Violence* (The Glenn Inquiry, 2014).

20 Wilson and others, above n 19, at 22.

21 At 65. The authors refer to systemic entrapment when Māori women seek help because they can no longer "manage" their partner's coercive control and in doing so: (a) fear their children will be removed from their care; (b) encounter bias, prejudice and racism from those with whom they engage in agencies; (c) encounter unhelpful people; and (d) find services unhelpful in providing the resources and support needed to keep themselves and their tamariki safe.

22 At 39. Growing up amidst family violence and sexual violence also laid patterns that dictated how Māori women responded in their adult intimate relationships: see *R v Ruddelle* [2020] NZHC 1983 at [5]-[18]. Karen Ruddelle grew up amid violence and alcohol abuse, as well as being compelled to take up parental responsibilities for young siblings. This gave her a heightened sense of responsibility to care for and protect others at risk of harm.

I PARTY LIABILITY

The operation of party liability in relation to women in relationships with coercive and controlling men who offend has been described as a "significant blind spot in the legal system and in much academic work", which results in the "unfair labelling of women's actions and their grossly disproportionate punishment".[23]

Women who are subjected to coercive control from their partner and his lifestyle[24] — sometimes "layered on top of previous abuse suffered in childhood",[25] ill health and self-medicating coping strategies,[26] as well as broader circumstances of entrapment[27] — are rendered vulnerable to being convicted of their male partner's crimes. This can be because they play a role in his offending (minor or more significant) or simply because they are present at the scene of the crime and unable to leave because of significant fear or threats.[28] Or they can be involved in a crime and become implicated in a more serious offence because their partner "suddenly raises the stakes" by, for example, unexpectedly producing a weapon during an altercation.[29]

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23 Susie Hulley "Defending 'Co-offending' Women: Recognising Domestic Abuse and Coercive Control in 'Joint Enterprise' Cases Involving Women and their Intimate Partners" (2021) 60 The Howard Journal 580 at 581–582.

24 By lifestyle we mean, for example, his involvement with criminal networks or activities or gang association. For practical examples see Family Violence Death Review Committee *Appendix: Social entrapment: A realistic understanding of the criminal offending of primary victims of intimate partner violence* (Health Quality and Safety Committee, 2018). In June 2021, Corrections recorded that 155 women in prison (25 percent) had links to gangs: Office of the Inspectorate, Department of Corrections, above n 7, at 15.

25 Hulley, above n 23, at 583. See also Ladan Hashemi and others "Exploring the health burden of cumulative and specific adverse childhood experiences in New Zealand: Results from a population-based study" (2021) 122 Child Abuse Neglect 105372.

26 For example, poor mental and physical health and substance use or dependencies. See Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality and Safety Committee, June 2014) at 79.

27 See Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) 2 NZ L Rev 181; and Wilson and others, above n 19.

28 Women can be "unaware of offences involving their partner until they [a]re 'at the crime scene', at which stage 'it [i]s very difficult to back out' not least because they [a]re 'scared'": Hulley, above n 23, at 582, citing Christopher Mullins and Richard Wright "Gender, Social Networks and Residential Burglary" (2003) 41 Criminology 813 at 820. Note that the law on omissions can result in women being convicted as primary offenders, rather than secondary parties, for failing to protect their children from their partner's abuse: see Julia Tolmie and others "Criminalising Parental Failures: Documenting Bias in the Criminal Justice System" (2019) 3 NZWLJ 136.

29 Dorinda Welle and Gregory Falkin "The Everyday Policing of Women with Romantic Co-defendants" (2000) 11 Women and Criminal Justice 45 at 55–56.

In one of the few sustained investigations into this issue, Becky Clarke and Kathryn Chadwick found that 90 percent of the women they identified who were convicted of serious violence via the joint enterprise doctrine in the United Kingdom had not engaged in any violence themselves.[30] These women were often marginal to the violent event that formed the basis of criminal charges against them and yet they were convicted and punished in the same way as those who actually used violence. They were "most likely to be implicated in the offence based on their association with their male partner or presence at the scene, rather than their active involvement in the offence".[31] Many of the women in the study had experienced abuse in childhood and almost half were experiencing IPV at the time of offending.[32] In 87 percent of these cases their co-defendant was the perpetrator of this abuse.[33] Similarly, Stephen Jones found that the majority of women offending with a male co-defendant in his sample had offended as the result of "coercive or manipulative behaviour on the part of a male co-defendant".[34]

In Aotearoa New Zealand there are no studies on women who are brought into the criminal justice system as parties to the offending of their male associates. However, cases on the public record provide examples of this phenomenon. For example, in the leading Supreme Court case on party liability, *Ahsin v R*, two women had their convictions for murder based on secondary party liability overturned because of inadequacies in the summing up of the trial judge on the law on party liability.[35] As a result they were sent back for retrial on homicide charges six years after the killing occurred.[36] The murder was actually committed by two patched Black Power male gang members. The women were charged because one (who was in intimate relationship with one of the men) was driving the car that conveyed the men to the scene, whilst the

30 Clarke and Chadwick, above n 15, at 4. These percentages are in relation to 84 cases about which the authors had sufficient detail to comment.

31 Hulley, above n 23, at 585.

32 Clarke and Chadwick, above n 15, at 17.

33 At 17.

34 Stephen Jones "Partners in Crime: A study of the relationship between female offenders and their codefendants" (2008) 8 Criminology and Criminal Justice 147 at 159. The participants were classified as offending under direct violent coercion, as a result of male expectation (by men who were usually abusive or manipulative), through infatuation with men, by willing participation or with a female codefendant.

35 *Ahsin v R*, above n 11.

36 In 2015 Ms Ahsin plead guilty to manslaughter charges and in 2016 Ms Rameka was found not guilty by a jury after going to trial on manslaughter charges: see Kirsty Lawrence "Rameka found not guilty in Whanganui manslaughter trial" *Stuff* (online ed, 18 April 2016).

other was sitting in the car and had shouted abuse during the evening at rival gang members.

A The Law on Party Liability

Secondary party liability is a legal construct, and in some cases a legal fiction. When someone meets the legal requirements for party liability in respect of someone else's offending they are convicted of that offence as though the primary party's offending was their own.[37] Any diminution of responsibility because of their secondary role is accommodated at sentencing. However, if the person is being sentenced for very serious offending their sentence is still likely to reflect that fact. A conviction for murder, for example, has a presumption of life imprisonment for anyone convicted of it — either as a principal or secondary party — and this presumption must be overturned if a lesser sentence is to be given.[38] The women convicted under the joint enterprise doctrine in Clarke and Chadwick's report were serving long or indeterminate sentences (the average was 15 years imprisonment) for crimes that they had not personally committed.[39]

1 Aiding and Abetting

In New Zealand there are two pathways to party liability. The first pathway is under s 66(1)(b)–(d) of the Crimes Act 1961 which imposes liability upon a person who intentionally "aids, abets, incites, counsels or procures" the principal's offending, knowing the essential matters of the offence.

Aiding, abetting, inciting, counselling or procuring is essentially any form of "assistance or encouragement".[40] There is no requirement that the assistance or encouragement be substantial. Whilst simply being present at the scene of the crime is not enough to amount to encouragement in respect of the principal's offending,[41] it does not take much to tip the threshold. For example, when there is some additional (minor) behaviour by the party that indicates support;[42] where their presence directly contributes to the offending by giving the principal an audience;[43] or where prior behaviour by the party or an existing

37 Crimes Act 1961, s 66.
38 Sentencing Act 2002, s 102.
39 Clarke and Chadwick, above n 15, at 4.
40 *Larkins v Police* [1987] 2 NZLR 282 (HC) at 14; and *Ahsin v R*, above n 11.
41 *R v Coney* (1882) 8 QBD 534 at 557–558 per Hawkins J.
42 *R v M* [2008] NZCA 193 at [26]; and *R v Inoke* [2008] NZCA 403 at [30].
43 *R v Schriek* [1997] 2 NZLR 139 (CA); and *R v Witika* (1991) 7 CRNZ 621 (CA) at 622.

relationship between the party and the principal gives a supportive flavour to the party's presence.[44] And of course presence is not required for assistance or encouragement to be proven at an earlier point in time.

It is thought that stringent mens rea requirements avoid spreading the web of criminal liability too wide for this form of party liability:[45] the need to prove an intention by the secondary party to assist or encourage the primary offender whilst they know the essential matters of that offending.[46] However, there is no requirement that the party "desire" that the principal commit the actual offence. It is therefore possible to "intend" to assist or encourage someone because the party knows that it is certain that the offender will take encouragement or receive assistance from their actions, even if the party hopes they will not and does not wish the offending to take place.[47] A mens rea requirement that can be easily satisfied in circumstances where the secondary party does not have significant choice or agency in relation to their involvement does little to constrain the operation of party liability.

This brief discussion shows that not much is required for party liability under s 66(1)(b)–(d). A party's contribution to the principal's offending can be slight, if not negligible, and consist of behaviours that in any other context would be entirely innocent. It follows that a woman in a "relationship" with an abusive man who uses coercive control, including threats to her or others' lives (including children), would not need to do much to constitute support or encouragement of his criminal behaviour. For example, being in his company at the scene of the crime or driving the car is likely to be enough, so long as she can be inferred to be aware of the offending he embarked upon and therefore intend to assist or encourage it.

The rationale for liability under s 66(1)(b)–(d) is that a person who deliberately encourages or helps another person to commit a crime has some moral responsibility for what takes place. However, a victim-survivor of IPV

44 *R v Duncan* [2008] NZCA 365 at [12]. In *Duncan* the Court of Appeal held "A person who is voluntarily and deliberately present, witnessing the commission of a crime and offering no opposition or dissent when he or she might be expected to do so, could be a basis for an inference that the person was intending to encourage and assist the commission of an offence": at [15].

45 Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis Wellington 2022) at 558.

46 This is subject to the caveat that it is sufficient that the offence committed by the principal is one of a range of offences that the accused knew that the principal would commit: *R v Baker* (1909) 28 NZLR 536 (CA) at 543–544, per Cooper J; and *R v Kimura* (1992) 9 CRNZ 115 (CA).

47 *R v Wentworth* [1993] 2 NZLR 450 (HC).

— whose encouragement or help to their co-offender is provided only under coercion from their co-offender (because, for example, they are in such fear of their partner that they can neither protest, refuse to help him or leave the scene)[48] — can hardly be considered to have much influence on their partner's offending (if any). In these circumstances it is he, not she, who is the impetus for the offending, including whatever assistance she provides. It follows that the rationale for conviction is absent, or at least greatly diminished, in the kinds of cases under examination here.

It is important to note that in the authors' experience of supporting women in these circumstances, statutory agencies have not been able to protect such women from their abusive partners prior to the men's criminal offending (to which the women can be deemed a party).[49] Their (ex)partners and his associates tracked the women down when they sought safety from friends and whānau, in refuge accommodation and in residential substance abuse treatment. The public were warned not to approach some of these men because they were considered too dangerous, yet these women were somehow expected in the eyes of the law to be able to safely remove themselves from such men and their criminal activities. It is not surprising that some women said that the only place they could be safe from their male partner was in a women's prison.

2 *Common Purpose Liability*

Section 66(2) of the Crimes Act is the second pathway to party liability in New Zealand. This imposes liability on a person who embarks on a criminal enterprise with the principal offender in respect of any crimes committed by the principal, including crimes that the party did not specifically encourage or assist, so long as they knew those crimes were at risk of occurring in pursuit of their joint criminal enterprise and did in fact occur whilst the principal was pursuing the criminal plan.[50] This form of party liability is called the "common purpose doctrine" or the "joint enterprise doctrine".

Under the common purpose doctrine, a woman could be liable for crimes committed by her violent partner that she is not privy to and which occur when she is not present, so long as she can be proven to have joined

48 Hulley, above n 23, at 592.

49 Wilson and others, above n 19, which describes systemic entrapment by agencies in the family violence and sexual violence sectors.

50 See Tolmie and others, above n 45, at 566, 572-584.

a "common unlawful purpose" with him (which he is pursuing when he commits these crimes) and it can be inferred that she foresaw these crimes "could well happen".[51]

The suggested justifications for this form of party liability all hinge on the secondary party *voluntarily* joining a "common unlawful purpose" with the person who offends.[52] For example, it is said that the secondary party, by "… joining forces with [the principal], signs up to the goals of the joint enterprise and accepts responsibility for all the wrongs (perpetrated by [the principal]) in realising that goal".[53]

Alternatively, the secondary party is said to have enhanced the risk that the principal might commit the incidental offending by lending their weight to the main offending out of which it flowed.[54] Clearly none of these rationales are satisfied by circumstances in which a woman is part of the common unlawful purpose only because of coercion from the principal.

3 Withdrawal from Party Liability

A party can withdraw under both s 66(1) and s 66(2) of the Crimes Act and escape criminal liability, provided they do so effectively prior to the crime being committed by the principal. The majority in *Ahsin* set out the legal requirements for withdrawal in the following terms:[55]

> First, there must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending. Secondly, the withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

In deciding whether what has been done by way of withdrawal is "reasonable and sufficient in the circumstances of the case":[56]

> … particular consideration must be given to the nature and degree of assistance or encouragement that has been given and the timing of the attempted withdrawal in relation to the perpetration of the offence.

51 Hulley, above n 23, at 593, describes the police inferring this knowledge from the fact of the relationship with her partner.

52 See Beatrice Krebs "Joint Criminal Enterprise" (2010) 73 MLR 578 at 593–594.

53 At 594.

54 At 595–596.

55 *Ahsin v R,* above n 11, at [134].

56 At [135].

If the party's conduct was words, then "communicating discouragement … with sufficient clarity … may be enough actually to undo … the influence of" their encouragement.[57] However, if it was "actions of assistance, further reasonable steps to undo" or otherwise prevent the crime may be required — "for example, retrieval of a weapon provided, warning the victim or contacting the police".[58] If left too late there may be circumstances where withdrawal is extremely difficult, or even impossible, because no action is capable of undoing what has been done.

The majority in *Ahsin* held that as soon as a party has provided assistance or encouragement, they are liable as a secondary party, albeit that their liability does not "crystallise" until the principal offender commits the main offence.[59] Taking this approach means that once the secondary party has provided assistance or encouragement guilt automatically follows unless they are able to raise the "defence" of "withdrawal".[60]

In *Ahsin*, as noted above, Ms Ahsin drove the principals (two male patched Black Power members — one of whom was her partner) to the place where an attack was launched on the victim, selected because he was in the street wearing the colours of a rival gang. Whilst the attack was taking place, she exhorted the two men to return to the car and then drove them from the scene of the crime. It was held that to withdraw she needed to do more than try to verbally dissuade the principal from attack:[61]

> … [i]n light of her considerable prior involvement in driving and positioning the car for the attack … Had she driven off, with or without a prior warning that she was going [to] do so, that conduct might have been sufficient and capable of influencing [the principal] to end the attack. But she did not.

The Court was not asked to consider whether these courses of action were available to Ms Ahsin or if they would have invited serious violent retaliation against her, by either her partner or his associates. The majority went on to

57 At [136(a)].
58 At [136(b)].
59 At [114]–[123].
60 The alternative view — see, for example, Elias CJ dissenting on this point at [20] — is that the party must be actively assisting or encouraging or still be part of the unlawful enterprise when the principal commits the main offence in order to meet the requirements for party liability at the relevant moment. In other words, if their support is not current or has lapsed at that point then they are not guilty even if they do not meet the requirements for the "defence" of "withdrawal".
61 At [148].

express the opinion that she had already provided "such considerable and crucial assistance and had allowed the course of events to progress" so far that it was likely to be impractical for her to undo her assistance and therefore legally withdraw on this set of facts.[62]

B Conclusion

This brief overview of the law demonstrates the breadth of party liability. The problem for women in an intimate relationship with violent men who offend is that little by way of action is required to prove support for their partner's offending or to demonstrate that they "joined" the offending out of which his further offending arises. In other words, it will not be difficult when a victim-survivor has an intimate relationship with an abusive partner who chooses to offend to find evidence of the victim-survivor's support or assistance for any known offending by their partner and liability for any predictable further flow on offences.

Furthermore, the effect of the majority position in *Ahsin* is that any practical assistance or encouragement that a victim-survivor provides does not lapse with time. To "withdraw" once she has provided such assistance or encouragement, a party must expressly communicate to her violent partner her lack of support for his offending and undo the effect of any assistance that she has provided. In other words, she must engage in highly confrontational acts of overt resistance — something that may not be realistically possible on the facts without extreme violent (and other forms of) retaliation.[63]

The law on party liability is built on the assumption that the party has a choice to become involved in another's offending. However, this assumption is highly problematic for women in intimate relationships with men who abuse them. Some of these women do not even have a choice about being in a "relationship" with the principal offender, let alone his activities.[64] The authors are not aware of any party liability case in Aotearoa New Zealand

62 At [149].

63 Wilson and others found one way young Māori women at risk of harm or in situations that threatened their safety resisted violence, was by indicating agreement with partners, or living "a lie" to get safely out of an unsafe situation: see Denise Wilson and others "Reflecting and learning: A grounded theory on reframing deficit views of young indigenous women and safety" (2019) 41 Health Care for Women International 690 at 695.

64 Some women have no choice about entering the relationship (see for example, *R v Chase* [2017] NZHC 244) and many are unable to separate — as noted above, when they attempt to leave they may be tracked down by their partner and his associates who are carrying weapons.

that recognises an IPV victim-survivor's restricted autonomy and agency as being relevant to her liability, even when the circumstances in which she joins or supports her partner's offending are inherently coercive. This lack of case law may be because any coercion is designed to be addressed via the general criminal defences of duress by threats (the defence of compulsion under s 24 of the Crimes Act) or duress by circumstances (which exists at common law). In the next section we therefore turn to explain that these defences are not realistically able to account for the coercion experienced by an IPV victim-survivor in relation to her violent partner's offending.

We note that, as pointed out by Hulley, the situation is worse than simply the expansive breadth of the law on party liability combined with an underlying assumption that those who support another person's offending are exercising agency and choice in doing so.[65] Women may not feel safe in even mounting a defence related to their partners: as illustrated by the *Ahsin* case, women are often physically tried with their male co-offenders.[66] This means that the coercion a victim-survivor is under comes into the courtroom with his presence, making it impossible for her to be honest about the nature of that coercion to the court and making navigation of the court process, including any resolution discussions and pleas in mitigation at sentencing, extremely dangerous.[67] If she is in a relationship with a gang affiliated partner then she is not dealing with only one man but a collective who may monitor her activities and enforce her partner's control from a distance.[68] For example, even if her case is tried separately, these associates may be in court when she is tried and may be able to physically reach her even if he is incarcerated.

Women may also struggle to mount a defence due to their partner undermining them. Hulley cites an example of an abusive man who wanted his partner incarcerated whilst he was in prison for his offending so that she was not free to build a life without him.[69] The simple way of achieving this was to implicate her in his offending by alleging that she had provided him with support or encouragement.

65 Wilson and others, above n 19, at 593–597. See also Welle and Falkin, above n 29, at 56–59.

66 See *R v McCallum* HC Whanganui CRI 2008-083-2794, 12 February 2010.

67 Asking for severance and a closed court is likely to advertise that such disclosures will be made. Clarke and Chadwick, above n 15, at 14, note that the Crown overcharges in order to create pressure on defendants to plead guilty at the plea bargaining stage.

68 Welle and Falkin, above n 29, at 57–58.

69 Hulley, above n 23, at 596.

Coercively implicating their intimate partners in criminal offending should be considered as a strategic part of a male offender's pattern of coercive control — by entangling his partner in a criminal context he is able to make her social position even more precarious. Forced criminal activity forecloses safety for her because active criminal charges and a criminal history can exclude women from crisis services, such as refuges, and being framed as an "offender" calls into question the authenticity of her IPV victimisation. In the authors' experience, abusive male partners can purposely expose women to information about their criminal activity because this is very effective in preventing them from seeking help from the Police for IPV. If these women subsequently have any contact with the Police, it will be assumed by abusive partners they have informed the Police about *everything*. For women and those they hold dear, there are severe consequences for being an informant. In this context, forced involvement in criminal activity is another means by which abusive male offenders further entrap their female partners.

II THE DURESS DEFENCES

The way IPV operates over time to limit a victim-survivor's space for action has been well documented elsewhere and will be not traversed in great detail here.[70] We simply note at the outset the need in this context to understand IPV as a form of entrapment,[71] as was accepted by Palmer J in *R v Ruddelle*.[72] This means that to understand the effect of IPV on the victim-survivor we must appreciate the impact of her abusive partner's pattern of coercive control on her over time,[73] as well as the deficiencies of the current New Zealand family violence safety system in mitigating the operation and harm of such abuse. In addition, it is necessary to understand how broader interlocking structural and intersectional inequities manifest in her life and how these affect her abusive partner's ability to coercively control her and diminish the quality of the IPV safety responses available to her from those around her.[74]

70 See Shevan (Jennifer) Nouri "Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships" (2015) 21 Auckland U L Rev 168. For a more dated account see Janet Loveless "Domestic Violence, Coercion and Duress" (2010) Crim LR 93.

71 Tolmie and others, above n 27, at 185.

72 *R v Ruddelle*, above n 22.

73 See Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007); and Hulley, above n 23, at 583.

74 See Hulley above n 23, at 591–592 and 595–596; and Rosemary Hunter "Narratives of domestic violence" (2006) 28 Syd LR 733 at 743.

The defences designed to recognise the role of moral compulsion in relation to a defendant's offending — either as a primary or a secondary party — are the defences of duress by threats (compulsion) and duress by circumstances (sometimes called "necessity"), and we turn now to address these in this order. These defences provide exceptions to the:[75]

> … fundamental principle that those who choose to break the law are, and should be held, responsible for their crimes. The defences' underlying rationale is that, in these circumstances, the accused has no real choice but to break the law.

A The Law on Compulsion

1 The Legal Requirements of the Defence

Section 24(1) of the Crimes Act enacts the defence of "compulsion", codifying the common law defence of "duress by threats". Section 24(1) provides that:

> … a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion.

The New Zealand Law Commission has expressed the view that the wording of s 24 should not require a battered woman to justify continuing in a relationship with a violent offender before she can raise the defence.[76] Not only, as pointed out by the Law Commission, should the defence only be excluded when there is some moral fault on the part of the defendant contained in the fact of association,[77] but separation does not guarantee safety for women in violent relationships (in fact, it may escalate danger) and is not always readily achievable, particularly when there are children involved.

75 Nouri, above n 70, at 170.

76 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [206]–[207].

77 At [206].

The Court of Appeal in *R v Teichelman* distilled s 24 of the Crimes Act into the following legal requirements: [78]

i) There must be a specific *threat* to *kill* or cause *grievous bodily harm* if the defendant does not commit the crime.
ii) The threat must be that death or grievous bodily harm will occur *immediately*.
iii) The person making the threat must be *present* during the commission of the offence.
iv) The defendant must have committed the offence in the *belief* that *otherwise* the threat will be immediately carried out.

This test can be contrasted with the defence of duress by threats as it now exists in those jurisdictions that have retained a common law defence. The Supreme Court in *Akulue v R*, noted that at common law imminence (or immediacy) of threat and the presence of the threatener are no longer legal requirements, instead: [79]

> … the common law defence depends on the defendant not having had a reasonably practicable way of avoiding compliance with the threat. While in part less restrictive than the statutory test (because immediacy and presence are not required), the common law test is objective rather than subjective and in this respect is more restrictive than s 24.

In other words, the defence as set out in s 24 measures coercion subjectively — the person must believe that the threat will be carried out — but contains narrow legal requirements confining the defence to certain types of threats. On the other hand, the common law defence drops these requirements but sets a broad normative test requiring proof of objective or reasonably experienced coercion.

As noted by the New Zealand Law Commission and Shevan Nouri, the narrow requirements set out in s 24 are particularly ill-suited for offences

78 *R v Teichelman* [1981] 2 NZLR 64 (CA) at 66–67. The cases insist on a specific threat. It will not be enough for the accused to comply with a request from someone because they are afraid of what that person will do to them if they do not. This is so even if they have good reasons for being afraid and even if they feel that the outcome will be immediate harm or death if they do not comply with the requirement: see also *R v Raroa* [1987] 2 NZLR 486 (CA).

79 *Akulue v R* [2013] NZSC 88 at [14].

committed because of IPV coercion.[80] Such requirements essentially limit the defence of compulsion to situations where the abuser is physically standing over the victim-survivor and using specific threats of immediate serious harm or death *on that occasion* to force her to participate or be present to his offending. In other words, they require the coercion that she is under to be in the immediate transaction or "single event" that constitutes the offending.

The problem is that IPV is not one transaction — rather, it is a raft of strategies (the use of violence and threats, as reinforced by other indirect strategies of control, such as isolation, surveillance and micro-regulation) which have a cumulative and compounding effect over time and are directed at closing down the victim-survivor's space for action and removing her autonomy.[81] Physical violence in this dynamic is not random or incidental but rather strategic and retaliatory.[82] The victim-survivor's fear can be rooted in her "knowledge of [her] partner's competency as a dangerous avenger".[83] The physical violence may also consist of chronic low level violence that has a cumulative intensity for the victim-survivor so that she begins to contain her own behaviour because she is exhausted and overwhelmed. Evan Stark comments that: [84]

> … the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts.

80 Law Commission, above n 76; Nouri, above n 70. Loveless, above n 70, at 95, suggests that the defence of compulsion "is based on the way in which men may more typically experience coercion through clearly identifiable specific threats of serious harm rather than by the incremental destruction of self-esteem characteristic of prolonged domestic violence".

81 Nouri, above n 70, at 180 points out that the immediacy requirement "wrongly separates out the abused offender's behaviour from the abusive context of coercive control to which it responds". Furthermore, the requirement for a specific threat of grievous bodily harm of death fails to account for the coercion that is contained in the accumulated weight of multiple harms over time.

82 *R v Maurirere* [2001] NZAR 431 (CA) is arguably wrongly decided on this point. In this case the accused's violent partner backhanded and continued to hit her across the face, demanding that she drive the car or he would "smash" her. His past violence included incidents in which he had severely blackened both her eyes, tramped a child's bike on her, dragged her by the hair and "booted" her in the head. The Court of Appeal held that she could not raise the defence of compulsion because serious injury was not threatened, as opposed to more of the kind of behaviour she had already been subjected to, perhaps a "serious assault" but not the infliction of grievous bodily harm (at [20]). This suggests that had the defendant not complied with her partner's wishes on this occasion the abuse was not likely to have continued escalating in intensity until she did so. In the authors' view this is faulty logic given the dynamics of this sort of violence.

83 Hulley, above n 23, at 590.

84 Stark, above n 73, at 94.

Stark also explains how coercive control is designed to exercise coercive pressure on the victim-survivor even when she is not in the presence of the predominant aggressor. He comments that frequently:[85]

> … men deploying coercive control prevent escape and exposure through a spatially diffuse pattern of rules, stalking, cyber-stalking, beepers, cell phones, and other means that effectively erase the difference between confinement and freedom by extending surveillance and behavioural regulation to all those settings where victims might restore their identity or garner support, including work, school, church, service, family and shopping sites.

The ongoing terror experienced by a woman dealing with a coercively controlling partner is therefore not based on nothing — it is the effect of cumulative and compounding violence and abuse that is strategic and retaliatory in nature, which is often combined with abusive partners' unpredictable nature.

The requirement for physical presence and a specific threat of immediate harm — as currently needed for a successful defence of compulsion — are built on the assumption that if the person making the threat is not physically present or the threat will not be immediately executed, then the threat may not come to pass or the victim has other realistic means of defusing it and achieving safety (for example, calling the police, appealing to members of the public or exiting the situation).[86] These assumptions are factually erroneous in the IPV context.

When the true nature of IPV is understood it also becomes apparent that, contrary to popular assumption, the safety strategies currently available to victim-survivors of IPV do not match the coercive pressure of the abuse that they experience. Calling the police, getting a protection order or attempting to separate from the abusive partner may, in fact, escalate the danger a victim-survivor is in by inviting a retaliatory response from their partner, without providing effective protection against this probable risk.[87] For women

85 At 208.

86 William Young J stated in *Akulue,* above n 79, at [23], that the requirements for presence and immediacy "reflect a legislative purpose that if there was sufficient time to seek assistance from the authorities, a defence of compulsion is not available". Furthermore, the defence of compulsion is not available "based on the belief, reasonable or otherwise, of the defendant that assistance from the authorities would not be forthcoming if requested".

87 For a discussion of this dynamic see Stella Tarrant, Julia Tolmie and George Guidice *Transforming Legal Understandings of Intimate Partner Violence* (ANROWS Research Report 3, June 2018) at 36–38.

dealing with broader structural inequities, the responses by agencies charged with providing them with safety and other support may make the situation significantly more dangerous, cause further harms and fail to provide real help or protection.[88] This aspect of IPV (the second and third dimensions of an entrapment framework) is crucial to grasp if we are to apply the law with any degree of reality to the facts of such cases.

The difficulties in raising the defence of compulsion were acknowledged by the New Zealand Law Commission in 2001. The Commission said that:[89]

> … some defendants, especially victims of domestic violence, may require neither a specific threat nor the actual presence of their abuser to be coerced into offending. Experience may have taught them that the response to disobedience on their part would be severe physical retribution, so that they may offend out of general fearfulness of their abuser without the need for the abuser to make "a particular kind of threat associated with a particular kind of demand". Arguably the coercive force of this fearfulness is not any less because the abuser is not actually present, if his or her ability to mete out punishment is certain.

This means that a woman who is too terrified to withdraw, protest or resist during her abusive partner's offending because she knows what will happen to her if she does, or who experiences coercion even when she is not in his immediate physical presence because she sees no real safety options in her situation for herself or her children,[90] will not be able to meet the specific requirements of the defence of compulsion. This is despite the fact that she may fall squarely within the rationale for having such a defence, in that she had no realistic choice but to act as she did.

In other jurisdictions there have been legislative reforms directed at addressing this justice gap. A number of Australian jurisdictions have relaxed or removed the specific technical requirements of "imminence" and "presence" in favour of a broad normative but objective test for compulsion in their

88 See Wilson and others, above n 19.

89 Law Commission, above n 76, at 63 (citations omitted).

90 The danger that the predominant aggressor poses to the victim-survivor's parents, siblings, children and friends may exercise a far greater coercion over her than threats to herself. It is not clear whether threats to third parties satisfy the requirements of s 24, although it is likely that they do: see for example: *R v Sowman* [2007] NZCA 309 at [40]; and *R v Neho* [2009] NZCA 299 at 469.

legislative provisions.[91] For example, in Western Australia, reforms were adopted following explicit recognition that the law disadvantaged battered women.[92]

In Aotearoa New Zealand, however, calls for similar legislative reform have been unheeded. In *Accident Rehabilitation and Compensation Insurance Corporation v Tua*, the accused had fraudulently claimed ACC home-help expenses at the instigation of her partner and was convicted of using a document to obtain a pecuniary advantage.[93] Although her partner regularly beat her and forced her to do things she did not want to do and she had a head injury and functioned at the level of a seven-year-old child, she was unable to demonstrate compulsion because she was unable to satisfy the requirements of immediacy and proximity at all the times that she filled out the claim forms. Although not directly speaking about the defence of compulsion, the District Court Judge said:[94]

> In my view the law is deficient in this case, as in New Zealand, there is no scope for negativing the specific intent formed on the basis of acts done in response to a grossly abusive and battering relationship. The present type of scenario is not uncommon in cases coming before the District Court in these type of charges …

In 2001, a large majority of those making submissions to the New Zealand Law Commission concerning the defences to homicide for battered defendants were of the view that the defence of compulsion should include non-specific threats arising from the circumstances of the relationship with

91 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "When Self-Defence Fails" in Kate Fitzgibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, Sydney, 2015) 110 at 122. See also Crimes Act 1958 (Vic), s 9AG(4).

92 Section 32(2) of the Criminal Code (WA) provides that:

> A person does an act or makes an omission under duress if—
>
> (a) the person believes—
>
> (i) a threat has been made; and
>
> (ii) the threat will be carried out unless an offence is committed; and
>
> (iii) doing the act or making the omission is necessary to prevent the threat from being carried out; and
>
> (b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be; and
>
> (c) there are reasonable grounds for those beliefs.

93 *Accident Rehabilitation and Compensation Insurance Corporation v Tua* DC Auckland CIV-1999-480-12179, 18 February 1999. The case was under the previous version of s 228A of the Crimes Act 1961.

94 *Accident Rehabilitation and Compensation Insurance Corporation v Tua*, above n 93, at 15. See also *R v Atofia* [1997] DCR 1053 upheld by *R v Atofia* CA453/97 and CA455/97, 15 December 1997.

a violent offender and that the requirement for immediacy of threat should be replaced by a requirement of inevitability.[95] The Law Commission did not go this far; however, it did recommend modifying the defence so that whilst an immediate threat of death or serious bodily harm remains necessary, the requirement that the threatener be present during the offending be abolished.[96] This recommendation has never been implemented.

In the absence of legislative reforms, courts in other jurisdictions have attempted to address these problems by taking expansive interpretations of the legislative requirements for the defence so that more of the context can be considered in determining whether these requirements are met. For example, in *Goddard v Osborne*, a woman presented false documents in an attempt to obtain a welfare benefit whilst her husband remained out in the street.[97] The South Australian Court held that the husband was "present" for the purposes of duress and marital coercion if he was "near enough to exercise immediate control or influence over his wife's conduct".[98] New Zealand courts have, by way of contrast, strictly interpreted the requirements of s 24. For example the requirement that the threatener be "present" has been taken to require immediate physical proximity at all times during the offending.[99] In *R v Richards*, a woman in a relationship with a man who was abusing her was convicted of five counts involving dealing, drug utensils and premises offences under the Misuse of Drugs Act 1975.[100] The Court of Appeal acknowledged that had she not committed the offences "it seems likely she would have been beaten",[101] but dismissed defence counsel's attempt to argue that the woman's violent partner was constructively present due to "the battered women's syndrome condition".[102] The Court referred to the "plain words of the statute which require actual presence and the established line of authority".[103]

95 Law Commission, above n 76, at [188]. The idea is that this would extend consideration of the threat the victim faced beyond the immediate circumstances surrounding her offending.

96 At [201].

97 *Goddard v Osborne* (1978) 18 SASR 481 (SC).

98 At 485 and 493.

99 The Crimes Act 1961 replaced the words "actually present" in the previous version of s 24 with the word "present" — suggesting that constructive presence might be contemplated by the new wording. The Court of Appeal in *R v Joyce* [1968] NZLR 1070 (CA) found that the deletion of the word "actually" was of no significance and "present" meant physical presence.

100 *R v Richards* CA272/98, 15 October 1998.

101 At 2

102 At 4.

103 At 2.

Worse still, the New Zealand courts have begun to read requirements into s 24 that tighten the defence further and, arguably, are in direct contradiction to the wording used in the statute. For example, as noted above, on the express wording of s 24 the element of coercion itself is subjective. In *Raroa*, the Court of Appeal was clear that "an objective test" for the element of coercion "is not open in New Zealand where the wording of s 24 specifically refers to the belief of the accused thereby requiring a subjective test".[104] However, subsequent New Zealand cases have often failed to inquire into the accused's subjective appraisal of their options for dealing with the violence and, instead, used language suggesting that this issue is assessed as an objective question of fact. In *R v Neho*, the Court of Appeal said that:[105]

> It has been recognised as implicit in the defence of compulsion that the offender must have no realistic choice other than to break the law. If there is a reasonably available opportunity for the offender to seek help or protection or to escape the defence will not ordinarily be available.

The Court opined on the facts of that case that the accused had options available to her:[106]

> While we can understand her reluctance to notify the police, it was a reasonably available option to her at any stage prior to the offending. It was also open to her to advise the shop assistant of her situation while she was in the store on each of the occasions.

In this instance, given that the issue as to whether the threat would be carried out if she failed to commit the crime was to be assessed subjectively, the inquiry should have been whether the defendant — rather than the Court — thought that going to the police or speaking to the shop assistant would effectively defuse the threat. The approach taken in *Neho* arguably reinterprets the requirement for coercion as objective.[107]

104 *R v Raroa* [1987] 2 NZLR 486 (CA) at 492.

105 *R v Neho,* above n 90, at [13].

106 At [19].

107 See also *R v Sowman,* above n 90, at [38]; and *Holland v R* [2016] NZCA 621. One is tempted to think that the courts in the cases discussed here have merged aspects of the common law defence with s 24, leaving defendants with the worst of both worlds — a test with rigid elements of imminence and presence but also with an overall objective rather than subjective appraisal of the compulsion itself.

In Canada the defence of duress by threats is set out in similar restrictive terms to s 24.[108] In 2001, the Canadian Supreme Court held that it is:[109]

> … contrary to the principles of fundamental justice to punish an accused who is psychologically tortured to the point of seeing no reasonable alternative, or who cannot rely on the authorities for assistance. That individual is not behaving as an autonomous agent acting out of his own free will when he commits an offence under duress.

It was held that to deny such a defendant a defence was contrary to s 7 of the Canadian Charter of Rights and Liberties.[110] In *R v Ruzic*, the defendant imported heroin because threats had been made to her mother in Serbia, who the police were unable to protect.[111] Whilst the common law defence of duress would have been potentially available on the basis that there was no safe avenue of escape, the defendant was unable to raise the statutory defence set out in s 17 because the threats were to a third party, not immediate, and the threatener was not present during her offending. Section 17 was found to be unconstitutional in part — the Court stripped away the immediacy and presence requirements.[112] However, drawing on the common law, it replaced these requirements with the need for a "close temporal connection between the threat and the harm threatened" and the requirement that there be no safe avenue of escape.[113] This was to be assessed on the basis of how the situation would appear to a reasonable person in the circumstances in which the accused found herself.[114] Proportionality was also required — the harm caused cannot be greater than the harm sought to be avoided.[115]

In *Akulue v R*, the Supreme Court of New Zealand rejected taking the same approach on facts that were very similar to those in *Ruzic*.[116] It held that

108 See Criminal Code RSC 1985 c C-46, s 17.

109 *R v Ruzic* 2001 SCC 24 at [88]. See also *R v Ryan* 2013 SCC 3 at [23].

110 Section 7 of the Canadian Charter of Rights and Liberties provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

111 *R v Ruzic*, above n 109.

112 Four requirements of the statutory defence remain: there is a threat of bodily harm; there is a belief that the threat will be carried out; the offence is not on the list of excluded offences; and the accused cannot be subject to a conspiracy or criminal association.

113 *R v Ruzic*, above n 109, at [96].

114 At [61].

115 At [62].

116 *Akulue v R,* above n 79.

New Zealand courts, unlike Canadian courts, do not have the constitutional power to strike down statutory provisions.[117] This is clearly correct. However, the fact the legal requirements for a defence are contrary to fundamental justice should be influential in any process of interpreting what those statutory requirements mean and, particularly, whether they are to be interpreted strictly or more expansively.[118]

Foreclosing this possibility, the New Zealand Supreme Court went on to conclude that s 24 was consistent with fundamental rights to justice because not every case of moral involuntariness had to be covered by the defence.[119] The Court also concluded the common law defence was unavailable. The Court said:[120]

> While any humane system of criminal law must make allowance for involuntariness, we see no reason why this cannot fairly be achieved by the adoption of rules, the application of which turn on objective criteria (such as, for instance, immediacy and presence).

What the Supreme Court failed to recognise, as the Law Commission[121] and Nouri[122] have explained in detail, and as we have asserted above, is that the legal requirements set out in s 24 automatically rule out recognising coercion when it comes in the form of IPV (except in unusual cases) because the assumptions that underpin those requirements are not accurate in this context. The Supreme Court recognised that the defence might be under-inclusive because threats that are nevertheless very coercive may not meet the immediacy and presence criteria.[123] In our view the Supreme Court missed an opportunity to consider this under-inclusivity in terms of consistency with the New Zealand Bill of Rights Act 1990.[124] Such an assessment would be relevant, and perhaps indirectly beneficial, to victim-survivors of IPV acting under coercion.

The legislative and judicial indifference to the plight of IPV victim-survivors in this context is astonishing. It is feasibly explicable on the part

117 At [20].
118 See *D v Police* [2021] NZSC 2; and *Fitzgerald v R* [2021] NZSC 131.
119 At [20].
120 *Akulue v R*, above n 79, at [20].
121 Law Commission, above n 76.
122 Nouri, above n 70.
123 At [13].
124 See [24].

of the courts as judges have not traditionally understood the full nature of IPV and therefore have failed to realise that a justice gap exists. When IPV is wrongly conceptualised as a series of violent physical incidents,[125] in between which the victim-survivor is free to "choose" one of the (assumed to be) effective safety options, then the justice gap identified here becomes invisible. For example, in *R v Witika*, it was argued that where the offence charged is of a continuing nature — in that instance, the accused's failure to protect her child from her violent partner or to get medical care for the child's injuries — it should be a matter for the jury as to whether the threatener was sufficiently present to result in a continuing immediate threat throughout the commission of the offence.[126] However, the trial judge held that s 24 ceased to be available as soon as there was an omission by Ms Witika to get help at a time when Mr Smith (the predominant aggressor and the person threatening Ms Witika) was not physically present. The Court of Appeal agreed, remarking that:[127]

> … it is quite clear that there were substantial periods during which Smith was not present and Witika had opportunities to seek assistance and secure medical care for her child and otherwise bring an end to her ill-treatment. While those periods continued she failed in her duty. Her situation was no different from that of a person who has an opportunity to escape and avoid committing acts under threat of death or serious injury.

2 *The Unavailability of the Defence for Serious Offending*

The defence of compulsion is not available (even in its currently problematic iteration) for women who are coerced into serious offending. Section 24(2) of the Crimes Act sets out a list of offences for which the defence of compulsion is not available.[128] These encompass a range of the most serious offences in the Crimes Act, including murder, serious interpersonal violence and robbery.

Section 24(1) sets out the law of compulsion as it applies to the person who "commits an offence" and subs (2) provides that subs (1) does not apply

125 Family Violence Death Review Committee, above n 24, at 71–81; and Tolmie and others, above n 27, at 201–203.

126 *R v Witika* [1993] 2 NZLR 424 (CA).

127 At 436.

128 Treason (s 73) or communicating secrets (s 74); sabotage (s 79); piracy (s 92) and piratical acts (s 93); murder (ss 167, 168) and attempt to murder (s 173); wounding with intent (s 188); injuring with intent to cause bodily injury (s 189(1)); abduction (s 208); kidnapping (s 209); robbery (s 234) and aggravated robbery (s 235); and arson (s 294).

for a person who "commits" one of the listed offences. In *R v Witika*, the Court of Appeal said that the statutory exclusion covers both primary and secondary offenders — even though the primary offender is the one who actually commits the offence.[129] It follows that s 24 codifies the law on duress by threats for both the principal and secondary parties, meaning that the common law defence also does not survive for secondary offenders.[130] As a consequence, Ms Witika could not argue compulsion in relation to party liability for manslaughter on the basis that her violent partner threatened her, because s 24(2) expressly excludes the serious interpersonal violence offences (that result in manslaughter charges if death is caused) as offences for which the defence of compulsion is available.[131]

The court in *Witika* chose not to follow the Supreme Court of Canada in *Paquette v R* which arrived at the opposite conclusion on a very similarly worded provision.[132] The Supreme Court of Canada held that s 17 of the Criminal Code codifies duress where the person seeking to rely on the defence is the principal and has themselves committed the offence, whilst the more flexible common law version of the defence remains available for secondary parties[133] — and in relation to a broader range of crimes, because the legal

129 *R v Witika*, above n 126, at 435. The Court of Appeal was influenced by the fact that when the original version of s 24 was enacted (s 24(1) of the Criminal Code Act 1893), the defence of compulsion was excluded under the equivalent of s 24(2) for the offence of "assisting in rape". The Court of Appeal took this as indicating that the legislature contemplated that the statutory defence would, in the absence of such an exclusion, extend to a secondary party to a rape and, by implication, secondary parties in general. Although the Crimes Amendment Act (No 3) 1985 removed the words "assisting in rape" from s 24, "such a consequential amendment is not to be taken as changing the interpretation of 'commits' from that clearly required before the amendment".

130 Section 24 of the Crimes Act 1961 is a codification of the common law defence of "duress by threats" and the New Zealand courts have been clear that the defence does not survive at common law since codification: *Akulue v R,* above n 79, at [25].

131 In *R v Witika*, above n 126, at 435, the Court also commented that "[i]t is hardly sensible to assert that she was forced by threats from Smith to intentionally encourage Smith to commit the offences". This does not follow — there is no reason why a person cannot threaten a third party in order to ensure that that person both provides support to them and suppresses dissent in respect of the offending.

132 *Paquette v R* [1977] 2 SCR 189. What was more compelling for the Supreme Court of Canada than the fact that the exclusions included the offence of "assisting in rape," was the fact that the party liability provision in the Canadian Criminal Code, like s 66 of the Crimes Act 1961 (NZ), refers only to the principal offender as the one who "actually commits" the offence.

133 Because it allows a "more contextual and less arbitrary" enquiry — to borrow the words of David Paciocco "No-one Wants to be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56 Crim LQ 240 at 289.

exclusions set out in Canada's equivalent of s 24(2) do not apply.[134] William Young J points out that the:[135]

> … exclusion of some offences from the scope of the defence is a mechanism, albeit perhaps a little crude, for ensuring that the harm done by the defendant is not disproportionate to the threatened harm.

Similarly, Martha Shaffer suggests that the policy underlying these exclusions is that "people should be expected to endure serious threats, and if necessary, to give up their lives, rather than commit serious offences".[136]

However, as we have explained earlier, the incredible breadth of the doctrine on party liability means that a secondary offender may have done very little to contribute to another person's offending. As such, the policy reasons, including the moral obligations, behind the exclusions are considerably muted in relation to this form of liability. Indeed, it could be said that the policy rationale would result in a disproportionate harm to the secondary offender. Is it reasonable to expect a woman to lay down her life or endure serious physical harm rather than drive the car, for example, or sit in the passenger's seat whilst her violent partner conducts a robbery? Further, is it consistent with the policy of the defence of duress that it is not available in such a case because of the nature of her partner's offending?

3 Conclusion

Section 24(3) appropriately abolishes a previous common law presumption that if a woman committed a crime either jointly with her husband or in his presence then she was acting under coercion and should be acquitted. Unfortunately, as we have noted here, this abolition is not accompanied by a defence that can realistically accommodate those women who are acting under coercion from their abusive partner. In other words, we no longer assume that all women are under the thrall of their husbands, but we fail to provide a defence for those who are.

134 At common law compulsion was only clearly unavailable in respect of murder and attempted murder: *R v Howe* [1987] AC 417 (HL) (murder); *R v Gotts* [1992] 2 AC 412 (HL) (attempted murder); and *R v Z* [2005] UKHL 22 at [21] (perhaps including "some forms of treason"). But see William Young J in *Akulue v R,* above n 79, at [12], suggesting that treason and robbery may also have been excluded.

135 *Akulue v R,* above n 79, at [12].

136 Martha Shaffer "Scrutinising Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 Crim LQ 444 at 463.

B The Law on Duress of Circumstances

The second defence designed to recognise coerced offending is duress by circumstances. Section 20(1) of the Crimes Act provides that the common law defences survive "except so far as they are altered by or are inconsistent with this Act". A general common law defence of duress of circumstances, which some judges previously called the defence of "necessity", is preserved by this provision.[137] The defence is designed to cover situations where a person is coerced into offending not because another person is standing over them and demanding that they offend, but because they are caught up in emergency circumstances and left with no real choice. Duress of circumstances currently has four requirements in New Zealand:

i) The defendant has a genuine belief, "on reasonable grounds of imminent peril of death or serious injury".[138]
ii) The circumstances are such that there is "no realistic choice" but to break the law.[139]
iii) The breach of the law is "proportionate to the peril".[140]
iv) There is a nexus between the imminent peril of death or serious injury and the choice to respond to the threat by unlawful means, in the sense that the defendant committed the crime because in the agony of the moment their will was overcome.[141]

The New Zealand courts have effectively made this defence unavailable to primary victim-survivors of IPV by holding that the emergency situation must not be threats from a human (which must fall within the narrow stand-over requirements specified in s 24 to attract the defence of compulsion).[142] In *Akulue v R*, William Young J, writing for a unanimous Supreme Court, said that the Commissioners who developed the original draft code which contained the precursor to s 24, "sought to codify exclusively the circumstances in which compulsion by threats of harm from another person

137 *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA) at 57; *Police v Kawiti* [2000] 1 NZLR 117 (HC) at 122; and *R v Hutchinson* [2004] NZAR 303 (CA) at [43].
138 *Kapi v Ministry of Transport* at 57.
139 *Kapi v Ministry of Transport* at 57; and *R v Hutchinson* above n 137, at [34] and [60].
140 *Kapi v Ministry of Transport* at 57; and *R v Hutchinson* at [34].
141 *R v Hutchinson* at [34].
142 *Kapi v Ministry of Transport,* above n 137, at 54–55; *Police v Kawiti,* above n 137, at 120; *R v Neho*, above n 90, at [23]; and *Hocking v Police* [2012] NZHC 3192 at [10].

provides a defence, leaving only other circumstances of necessity to the common law".[143]

This was not a necessary conclusion. A principled distinction could have been drawn between the defence of duress by threats (which deals with stand-over situations) and the defence of duress of circumstances (which deals with emergency situations). The courts could have concluded that s 24 codifies the former but not the latter. In this case there is nothing inconsistent between s 24 codifying the law on duress by threats and the simultaneous survival of a common law defence of duress of circumstances, even where the source of the emergency is a human being. The former deals with situations where the threat is targeted at forcing the defendant to commit the crime. The latter deals with situations where the threat is not specifically directed at bending the defendant's will, but rather where the emergency that the defendant is in (which might include both a general threat of harm from a human source and a lack of other alternatives to deal with that threat) deprives them of a real choice about committing the crime.[144] At English common law the distinction between duress by threats and duress of circumstances was referred to by Woolf LJ in *R v Conway* as the "'do this or else' species of duress" and situations of more generalised emergency or danger.[145] Similarly, the English case law does not make a distinction between threats from human and non-human sources for the purposes of the defence of duress of circumstances.[146]

The problem with the current position in New Zealand is that it leaves those caught up in emergency situations created by other people, but who are not in stand-over situations, in a gap in coverage — without access to either the common law defence of necessity or duress of circumstances or the

143 *Akulue v R,* above n 79, at [29].

144 In *R v Hibbert* [1995] 2 SCR 973 at [50], the Supreme Court of Canada drew a distinction between duress where "it is the intentional threats of another person that are the source of the danger" and necessity where "the danger is due to other causes such as forces of nature, [or] human conduct other than intentional threats of bodily harm".

145 *R v Conway* [1989] QB 290 (CA) at 297.

146 *Conway*, above n 145, is an example of a case in which the defendant was permitted to raise the defence of duress of circumstances in response to the threat of harm from a person. The defendant in that case was charged with reckless driving but asserted that he was trying to avoid what he thought was going to be a fatal attack on one of the passengers in his car by some men approaching the car, whom he thought were potential assassins. In fact, the men were police officers who wished to apprehend his passenger. We note also that in the proposed New Zealand Crimes Bill 1989 (152-1) the defence of compulsion was split into two defences with distinct legal requirements: duress by threats and duress of circumstances (the latter not limited to threats with a non-human source): see Crimes Bill 1989, cls 30–31.

defence of compulsion set out in s 24.[147] Kevin Dawkins points out that there is an incoherence in the courts' current position. On the one hand s 24 is limited to specific types of threats, not the defendant's generalised fear of a dangerous person:[148]

> Yet on the other hand, when it comes to the availability of any common law defence of duress, s 24 is effectively recast so as to cover 'fear' cases and to exclude the preservation of such a defence under s 20.

III CONCLUSION

When the criminal justice response fails to recognise the coercion that women experience from their violent partners in finding them liable as primary or secondary offenders, as we have suggested in this article that it does, the legal response arguably perpetuates the abuse they experience, further restricting their freedom and exacerbating their systemic vulnerability to further abuse.[149] In other words, the criminal justice response becomes part of the systems of abuse which IPV victim-survivors are forced to navigate. As Shannon Speed asserts with respect to Indigenous and migrant women's experiences of incarceration in the United States, while interpersonal violence, criminal violence and state violence are often conceptualised separately:[150]

> … these forms of violence are inseparable, each bound to the other and mutually formative in the larger context in which they affect women's lives. Understanding that context is what necessitates an examination of the larger structures of power that render them vulnerable.

The focus of this article has been precisely that — seeking to understand how the wider operations of power embedded in New Zealand's law and

147 See Khylee Quince and Julia Tolmie "*Police v Kawiti*" and "Commentary on *Police v Kawiti*" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 481 and 489. See also *Hocking v Police*, above n 141.

148 Kevin Dawkins and Margaret Briggs "Criminal Law" (2001) 2001 NZ L Rev 317 at 336.

149 Hulley, above n 23, at 600. Welle and Falkin, above n 29, at 61–62, note that women with romantic co-defendants are policed by their partners in the private space, who augment the policing of these women by law enforcement in the public space — meaning that these women are subject to a "continuum of policing by law enforcement and romantic co-defendants". They note that "the unpoliced nature of the abusive behaviors of women's partners contributes to the criminalization of women" — who are understood to be offenders but not victims.

150 Shannon Speed *Incarcerated Stories: Indigenous Women Migrants and Violence in the Settler-Capitalist State* (University of North Carolina Press, 2019) at 17.

legal responses to crime render women experiencing IPV criminally liable for coerced "offending", inconsistent with the policy schema sitting behind party liability and the defences of duress and necessity.

VICTIM-SURVIVORS OF INTIMATE PARTNER VIOLENCE FORCED TO PARTICIPATE IN CRIMES: SOME THOUGHTS ON THE POTENTIAL APPLICATION OF DISCRIMINATION LAW

Jane Calderwood Norton* **and Julia Tolmie***

Continuing on from our first article in this edition, this article also examines the issue of victim-survivors who offend under coercion from intimate partner violence. It considers whether the unavailability of the defences of compulsion and necessity as a result of the courts' interpretation of these defences in Aotearoa New Zealand constitutes discrimination on the basis of sex. This article adds to the broader literature raising questions about the capacity of discrimination law (as it is currently conceived) to address sex inequality, particularly as it intersects with other forms of inequality based on class and race.

I INTRODUCTION

Our first article identified the major justice gap in Aotearoa New Zealand's response to those who offend while under coercion from their violent partners. We explained this is partly because the requirements of compulsion, as codified in s 24 of the Crimes Act 1961, are unlikely to reflect coercion as it is experienced by victim-survivors of intimate partner violence (IPV). However, this gap is also because the interpretation of the statutory defence of compulsion and the development of the common law defence of necessity by the courts has exacerbated the problem with this law for victim-survivors of IPV. Rather than interpreting and developing the law in a manner consistent with victim-survivors' experiences, the courts have based their interpretations on assumptions that are erroneous in the IPV context.

These interpretations have made it almost impossible for victim-survivors

* Senior Lecturer in Law at the University of Auckland.
** Professor of Law at the University of Auckland.

of IPV to raise a defence of compulsion or necessity, or both (the "duress defences"). Given the gendered nature of IPV (certainly towards the extreme end of the continuum), we explained in our first article how this disproportionately affects women.[1] It also means that women who offend are unlikely to be able to access the duress defences in the very circumstances in which they are most likely to experience coercion to offend.[2]

The problem is not that victim-survivors of IPV are unsuccessful in establishing either of the duress defences per se. Rather, it is that juries are *not even being asked to consider* whether the defendant committed the offence under compulsion or duress of circumstances. After all, even if the defences were left open to the jury, it would not be guaranteed that the jury would find them proven on any particular set of facts — the jury must still determine whether the defendant's will was sufficiently overcome by the coercion she experienced, and juries have traditionally been very circumspect about allowing victim-survivors access to the criminal defences.[3] However, by not permitting the defences to be put to the jury at all, victim-survivors of IPV are automatically deprived of these defences. In short, they are available in theory but not in practice.

A number of Australian jurisdictions, recognising the problems facing victim-survivors of IPV in accessing the duress defences, have undertaken legislative reform.[4] However, the defences in New Zealand have not been reformed and remain restrictive both in their legislative requirements and the judicial interpretation of those requirements despite, as noted in our first

1 Julia Tolmie and others "Victim-Survivors of Intimate Partner Violence Who are Forced to Participate in Crimes: Are they Treated Fairly in the Criminal Law?" (2023) 8 NZWLJ 117 at 130–147. Article 2(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence 3010 UNTS 107 (opened for signature 11 May 2011, entered into force 1 August 2014) recognises that domestic violence affects women disproportionately. See also Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, Wellington, June 2017) at 12. In family violence homicides that were IPV, men were 76 percent of offenders and 32 percent of deceased, whilst women were 68 percent of those deceased and 24 percent of offenders. Men and women were also offenders in very different conditions — unlike male offenders, the majority of female offenders were victims of IPV in the lead-up to the death event.

2 See Tolmie and others, above n 1, at 118–119.

3 See Ashlee Gore *Gender, Homicide, and the Politics of Responsibility: Fatal Relationships* (Routledge, London and New York, 2022).

4 See, for example, Criminal Code Act Compilation Act 2013 (WA), s 32(2); Crimes Act 1958 (Vic), s 322O; and Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "When Self-Defence Fails" in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, Sydney, 2015) 110 at 122.

article, the New Zealand Law Commission's recommendation for modest reforms to the defence of compulsion.[5]

This article examines whether, short of statutory amendments, discrimination law could address this justice gap by requiring the judiciary to revisit how it has interpreted and developed the law in this area. This article considers whether the disproportionate effect the current law of compulsion has on women could constitute unlawful discrimination on the grounds of sex. This is a novel approach and, while we think it has potential, our analysis also reveals the limitations of discrimination law (at least as it is currently conceived) in addressing substantive inequality and the reality of many women's lives. This article therefore adds to the broader literature questioning the capacity of discrimination law to address gendered and other forms of inequality.[6]

II DISCRIMINATION IN NEW ZEALAND LAW

Statutory discrimination law in New Zealand is contained largely in the Human Rights Act 1993 (HRA). The HRA only applies directly (and in a self-contained way) to certain areas, such as employment, access to public places, and the provision of goods and services. Its application outside of these areas, and where governmental action is concerned, involves a somewhat complex interplay with the right to freedom from discrimination in the New Zealand Bill of Rights Act 1990 (NZBORA), which is subject to justifiable limitations.[7]

The leading case on discrimination in New Zealand, *Ministry of Health v Atkinson*, involved a challenge to a government policy that excluded family members from payment for the provision of various disability support services to their children.[8] The complaint was made under pt 1A and s 20L(1) of the HRA (the sections that apply to discrimination by government). These sections combine to protect the right to be free from discrimination by the government on various grounds, including sex, as affirmed by s 19 of the NZBORA. Pursuant to s 20L(1), an act or omission — including those of the judiciary —

5 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at 201.

6 Two seminal texts are Catharine MacKinnon *Sexual Harassment of Working Women* (Yale University Press, New Haven, 1979) and Iris Young *Justice and the Politics of Difference* (Princeton University Press, New Jersey, 1990).

7 New Zealand Bill of Rights Act 1990, ss 5 and 19.

8 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. See also *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.

is inconsistent with s 19 if it limits the right to freedom from discrimination and there is not a justified limitation on that right under s 5 of the NZBORA. While *Atkinson* involved direct rather than indirect discrimination (and this article, as we will explain, is concerned with indirect), its analysis nonetheless applies to all instances of alleged discrimination by government.[9]

Under the approach in *Atkinson*, there are two steps to determining whether there has been discrimination in breach of s 19:[10]

> [T]he first step … is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

The first step also requires a "causative link" between the differential treatment and prohibited ground.[11] Differential treatment or effects will be deemed to have a discriminatory impact under the second step if it gives rise to a material disadvantage.[12]

In our first article, we detailed the adverse effect of the laws on compulsion and duress of circumstances on victim-survivors of IPV, who are predominantly women. In this article, we explore how these effects might constitute indirect discrimination, focusing in particular on the first step: the differential effects on the basis of sex.

III INDIRECT DISCRIMINATION

The concern identified with the duress defences is not that women are being treated differently because of their sex — which would be direct discrimination (also known as disparate or differential treatment) and requires intentionality — but that the *effect* of the law disadvantages women.[13]

9 See also *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC), which held that s 19 of the Bill of Rights Act prohibited both direct and indirect discrimination.

10 *Atkinson*, above n 8, at [55].

11 *Child Poverty Action Group*, above n 8, at [52].

12 *Atkinson*, above n 8, at [135]–[136]; and *Fehling v Appleby* [2015] NZHC 75, [2015] NZAR 547 at [84].

13 Direct discrimination does not require an intention to discriminate, but rather an intention to do the act that treats people differently by reason of a prohibited ground of discrimination (in this instance, sex): *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49]. In *McAlister*, the prohibited ground was a "material ingredient in the making of the decision to treat the complainant in the way he or she was treated". In the human rights (rather than discrimination legislation) context, the European Court of Human Rights has recognized that IPV itself is a form of discrimination against women: *Volodina v Russia* [2019] ECHR 539 at [110].

A facially neutral rule or practice that applies equally to everyone but which has the effect of disadvantaging people with a protected characteristic (such as sex) may be indirect discrimination unless there is a good reason for it.[14] Indirect discrimination (also known as disparate impact or differential effect) recognises that treating all people the same does not mean that you are treating them equally. It is said to be "concerned not just with the process of equal treatment but … the substance of actual outcomes".[15] In the leading United Kingdom decision on the issue, Lady Hale explained it this way:[16]

> Indirect discrimination assumes equality of treatment … but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

Lady Hale also explained that the reasons why one group may find it harder to comply with a rule or practice than others:[17]

> … are many and various … They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale.

We argued in our first article that the current law on compulsion and duress exacerbates existing inequalities for women and fails to accommodate the type of coercion under which women are most likely to offend. The difficulty with applying indirect discrimination doctrine and analyses to these criminal

14 Human Rights Act 1993, s 65. This section refers to "conduct, practice, requirement, or condition". For the origins of the concept of indirect discrimination, see *Griggs v Duke Power Co* 401 US 424 (1971). See also Selene Mize "Indirect Discrimination Reconsidered" [2007] NZ L Rev 27 at 28.

15 Hugh Collins and Tarunabh Khaitan "Indirect Discrimination Law: Controversies and Critical Questions" in Hugh Collins and Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing, Oregon, 2018) at 4.

16 *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343 at [25].

17 At [26].

defences is that, as the dicta of Lady Hale shows, indirect discrimination claims most commonly arise in the context of employment or education — environments rife with seemingly neutral practices and policies (such as dress code or uniform requirements) that disadvantage particular groups. The law, and what is required for a discrimination claim to succeed, has therefore been shaped by these contexts. We suggest, however, that despite the different context, indirect discrimination could also be seen to occur in relation to the criminal law's duress defences.[18] We do not attempt to resolve in this article whether these laws would meet all the technical requirements of indirect discrimination on the grounds of sex. Instead, we sketch an outline of how an indirect discrimination argument could be structured and point to some questions that would need to be resolved for it to succeed.

IV DIFFERENTIAL EFFECT

We explained in our companion article the adverse effect that the laws on compulsion and duress of circumstances have on victim-survivors of IPV, who are predominantly women. While men may also be unable to benefit from these defences — and, indeed, an argument could be made that the law is flawed for everyone — our argument is that it is membership in the protected group (women) that results in this disadvantage because the defence has been defined in such a manner that it is unavailable in the circumstances that women, by virtue of being women, are most likely to need this defence.[19] Of course, male victim-survivors of IPV would also be unable to argue this defence. However, the point is not that *no* men can suffer the negative effect of this restrictive law but that *women* are the significant portion of the people

18 For a discrimination argument in the criminal justice context (albeit in relation to sentencing) see Williams J's in dissent in *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412.

19 We have noted, for example, that a high proportion of women coming into New Zealand prisons have experienced family and sexual violence, and international research suggests that, whilst family relationships are a protective factor for male offenders, they are a risk factor for female offenders: see Tolmie and others, above n 1, at 118–119. Furthermore, women are significantly more likely than men to experience intimate partner violence: see Family Violence Death Review Committee, above n 1, at 12. Although we do not have data directly on point, we can extrapolate from this that women are most likely to experience the kind of coercion to offend that the defences of duress are directed at from male partners and family members in the form of family violence, but that this is not likely to be the case for men. As we have explained in our companion article, the legal requirements for the duress defences require finding sufficient coercion in the immediate circumstances surrounding the offending, and are therefore unable to recognise the cumulative and compounding effects of coercive control in the form of IPV: see Tolmie and others, above n 1, at 132–134 and 144–146.

who do. In other words, the negative effect of these overly narrow defences disproportionately affects women, far more so than men.[20]

The Supreme Court of Canada explained this disproportionality in the context of under-inclusive legislative protections that did not include sexual orientation as a prohibited ground of discrimination. In *Vriend v Alberta*, the Court found that although heterosexuals were also excluded from protection, this under-inclusiveness denied substantive equality to gays and lesbians. The Court held this was because, "considered in the context of the social reality of discrimination against gays and lesbians, [the exclusion] clearly has a disproportionate impact on them as opposed to heterosexuals".[21] This social reality meant that "[t]he absence of remedies [had] a real impact on homosexuals" but not on heterosexuals — homosexual people, unlike heterosexuals, were the ones who needed access to this law to make complaints about discrimination.[22] Likewise, we suggest that women, rather than men, predominantly need access to the duress defences in the IPV context. In turn, this means that if the defences are defined so as to be essentially unavailable in those circumstances, women are impacted more than men.

In New Zealand, the High Court in *Hoban v Attorney-General* has also recently accepted that under-inclusive legislative provisions in the discrimination law context can have a disproportionate impact despite both groups — in this instance heterosexual and homosexual people — being treated exactly the same under the law.[23] Indeed, the High Court rejected the Attorney-General's argument that heterosexuals and homosexuals were treated the same under the law as "an illustration of how the [comparator] exercise can illegitimately define away apparent discrimination".[24]

Some distinctions can be drawn between the law at issue in these cases and our duress defences. The duress defences are not under-inclusive (as

20 A similar argument has been made in relation to law denying women refugee status where they have been coerced through sexual assault into providing "material support" (which can include domestic services) to terrorists. One author has argued that the material support provision in United States law "while not facially discriminatory against women, disproportionately impacts women because women are more likely than men to be coerced to act under threat of sexual assault": Kara Beth Stein "Female Refugees: Re-Victimized by the Material Support to Terrorism Bar" (2016) 38 McGeorge L Rev 815 at 824.

21 *Vriend v Alberta* [1998] 1 SCR 493 at [82].

22 Wayne N Renke "*Vriend v. Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996) 34 Alta L Rev 925 at 942–943, as cited in *Vriend*, above n 21, at [82].

23 *Hoban v Attorney-General* [2022] NZHC 3235.

24 At [17].

was the case in *Hoban* and *Vriend*), in that the benefit of the law does not explicitly extend to some prohibited grounds of discrimination but not others. Moreover, men are also denied the duress defences, potentially including male IPV victim-survivors or men in circumstances that arguably have analogous features, such as coercion in the context of gang membership. Our argument is, however, that similar to *Vriend*, the social reality of IPV offending and victimisation means that it is women who most need access to this law in such circumstances. As such, it follows that women are more likely to find the defences unavailable if they are not available to victim-survivors of IPV. The impact therefore falls disproportionately on them.

The difficulty with a disproportionality argument is that the availability of statistical data may be crucial to establishing a prima facie disparate impact.[25] Statistical data — particularly that which would show that certain defences are not raised by women due to their IPV circumstances — is likely unavailable or impossible to obtain due to the very nature of criminal offending, data generation, IPV and the reality of these women's lives.

The challenge posed by this question — whether there is in fact a discriminatory effect where men are also denied access to these defences — arises from the need for a comparator in any discrimination claim. As we will see, this question also reveals how the comparator exercise, or at least its overly technical application, can present barriers to a successful claim in this area of law.

V THE COMPARATOR EXERCISE

A central issue for a finding of discrimination is identifying the appropriate comparator group. This is not entirely clear cut and identifying the appropriate comparator can be a challenge for any discrimination claim. As others have noted, the comparator group is often contested because narrowing or expanding the comparator group can diminish or widen the disproportionate disadvantage.[26] The concept itself — at least as an essential element of a discrimination claim — has been subject to criticism.[27] It has been said to "primarily … filter out, rather than to facilitate recognition of, numerous types

25 *Essop*, above n 16, at [28].

26 Collins and Khaitan, above n 15, at 14.

27 *Atkinson*, above n 8, at [60]; *Ngaronoa*, above n 8, at [121]; and Suzanne Goldberg "Discrimination by Comparison" (2011) 120 Yale LJ 728.

of discrimination".[28] Lord Nicholls described it as "arid and confusing".[29] One writer has said that it is "barely functional … and largely unresponsive to updated understandings of discrimination", causing a "crisis of methodological and conceptual dimensions" for this area of law.[30] Speaking more moderately, our High Court has warned that:[31]

> … care should be taken that the analysis does not become overly technical or unrealistic … it should always be remembered that the purpose of comparisons is to assist in identifying whether discrimination takes place in a real world sense.

However, for now at least, it is still seen by the courts as "a helpful tool"[32] and its use remains "inevitable" when a court is assessing whether there has been discrimination.[33]

The choice of comparator is "often critical" to the outcome in a case and yet highly dependent on the particularly statutory scheme at issue — a comparator in one setting may be inappropriate in another.[34] Given that an indirect discrimination argument has not been run in this area (namely, the availability of criminal defences) before — perhaps because criminal defendants typically lack privilege and are under-resourced — there is little case law to guide us.

The comparator group has been seen as the group that is like the discrimination claimant's group (the cognate group) but for the protected characteristic (in our case, sex, or, with an intersectional claim, sex and race).[35] To put it another way, the comparator is "a person in exactly the same circumstances as the complainant" but without the prohibited feature.[36] This is known as the "mirror approach" to comparators. However, the Court of Appeal in *Atkinson* suggested that the United Kingdom and Canada are retreating from the idea that the comparator should mirror the complainant

28 Goldberg, above n 27, at 742.
29 *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] 2 All ER 26 at [11].
30 Goldberg, above n 27, at 731.
31 *Hoban*, above n 23, at [16].
32 *Atkinson*, above n 8, at [60].
33 *Ngaronoa*, above n 8, at [121].
34 *McAlister*, above n 13 at [34].
35 Goldberg, above n 27, at 728.
36 *McAlister*, above n 13, at [49].

group save for the discriminating factor.[37] This is because it may thwart the substantive equality analysis and "fail to account for more nuanced experiences of discrimination".[38] Nonetheless, a comparator group is still needed "to determine whether the person or group is being treated differently to another person or group in comparable circumstances".[39] It is also said to enable the court to "sort out those distinctions which are made on the basis of a prohibited ground" and compare "apples with apples".[40]

Indirect discrimination requires showing comparative adverse *effect* on the claimant's group, in relation to a cognate group. To succeed in an indirect discrimination claim, *all* members of one group do not have to be treated one way (or suffer the same effect) compared to another.[41] Instead, "it is enough if a significant proportion of each group experiences either the positive or negative effect".[42] The classic example is a minimum height requirement for employment to explain how indirect discrimination can arise:[43]

> [M]ost women are shorter than men therefore the majority will not be able to satisfy the necessary requirement (establishing the negative effect). The result will be more positive for men who are generally taller than women. This establishes the disparate impact and hence, the indirect discrimination.

Another example is a requirement to work on a Saturday — it is more likely that Orthodox Jews and Seventh Day Adventists would experience a negative effect from being required to work that day than someone whose day of rest is Sunday, or who had no belief that paid work could not be undertaken on the Sabbath.[44]

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37 *Atkinson*, above n 8, at [60]. See also *McAlister*, above n 13, at [37].

38 *Withler v Canada* [2011] SCC 12, [2011] 1 SCR 396 at [58]. For a general discussion of the concerns with the use of mirror comparator groups see [55]–[60].

39 *Atkinson*, above n 8, at [60].

40 *Child Poverty Action Group*, above n 8, at [51].

41 *Essop*, above n 16, at [27]; and Lauren Qiu and others *Human Rights Law* (looseleaf ed, Thomson Reuters) at [HR65.03].

42 Qiu and others, above n 41, at [HR65.03]. See also Mize, above n 14, at 37–41 for a discussion of the difference between the "complete separation" and the "disproportionate negative effect" approaches.

43 Qiu and others, above n 41, at [HR65.03]. See also *Fehling v Appleby,* above n 12, at [85]. In the United States an indirect discrimination claim based on a weight requirement was successful for similar reasons: *Dothard v Rawlinson* 433 US 321 (1977).

44 See *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51, (2014) 13 NZELR 25; and *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9, (2014) 12 NZELR 92. Although, in both cases the Human Rights Review Tribunal found that the plaintiff had been discriminated against without needing to consider indirect discrimination under s 65 of the Human Rights Act.

In the context of the laws on compulsion and duress of circumstances, the cognate group (the group denied the benefit of these defences) could be seen narrowly as those offenders under IPV coercion. The comparator group are those not subject to IPV. The majority of those who are subject to IPV are women.[45] Therefore, women are negatively affected by this law. Put another way, the requirements to be able to avail oneself of the defence of compulsion (that the perpetrator is present during the offending and directly threatening the victim with immediate death or grievous bodily harm if they do not offend) and the defence of duress by circumstances (that the threat comes from a non-human source) will not be able to be satisfied by most women subject to IPV coercion and therefore the requirements will have a significantly greater negative effect on women compared to men, who are significantly less likely to be the victims of serious IPV.

This framing is not to suggest, of course, that being a victim-survivor of IPV is a protected characteristic. Nor is it to suggest that all women are victim-survivors of IPV. There may be women who are not subject to IPV who are also excluded from availing themselves of these defences. However, as mentioned, it is not a requirement of discrimination law that every member of the group be disproportionately affected. We also do not suggest, of course, that there is a facially neutral practice, condition or requirement under the law that a person not be subject to IPV when they claim the defence, which then falls more heavily on women. Rather, our argument is that the *interpretation* of the duress defences has the effect of excluding offenders subject to IPV (who are predominantly women) from claiming the defence. In this sense, the exclusion of the defences is one step removed from the express law being challenged. Again, this highlights the difficulty in applying a discrimination law framework that has evolved in the employment context to the criminal defences and the reality of the lives of women who experience IPV. Unlike in the employment context there is no readily identifiable employment or government policy that can be analysed.

An alternative (and wider) approach could see women offenders as the cognate group and male offenders as the comparator group. Under this

45 See n 1 above. The situation is exacerbated for Indigenous women. Māori women are over twice as likely to experience domestic and sexual violence as non-Māori women, and Indigenous Australian women are 34 times more likely to be hospitalised for domestic and sexual violence than non-Indigenous women: Doreen Chen *Domestic violence responses for incarcerated Indigenous women in Australia & New Zealand* (Research Brief, Australian Indigenous Justice Clearinghouse, December 2021) at 2.

approach, both are denied access to the defences.[46] Similarly, male offenders who are subject to IPV are denied access to the defences as are women who are subject to IPV. This exposes the flaws with the mirror approach to comparator groups because it can be at odds with a substantive equality analysis. It "becomes a search for sameness, rather than a search for disadvantage".[47] An analogy would be comparing female midwives with male midwives in terms of salary. This shows no formal inequality but masks the context that the sector is wholly or largely feminised. As we have already explained, while men may also be unable to benefit from these duress defences — and, indeed, an argument could be made that the law is flawed for everyone — it is our thesis that it is membership in the protected group (women) that results in this disadvantage, because it is women who are more likely to need this defence in circumstances of IPV and are therefore more likely to find it unavailable due to the circumstances in which they experience violent coercion.[48] Male offenders may be less likely to be denied the defences when in the kinds of coercive circumstances that men typically experience. The requirement that the compeller be physically present, for example, has a disproportionately greater negative impact on women than on men because the circumstances in which women are coerced will predominately involve someone whose coercion extends beyond their physical presence. While men (for example, those involved in gangs) can be coerced to participate in crime by someone not physically present, we suggest that there is a significant difference in likelihood compared to women in IPV circumstances. Moreover, while men may also be unable to raise the defence, they are not likely to be automatically precluded in the manner that victim-survivors of IPV are because the way IPV coercion occurs does not meet the legal requirements for the defence.[49] The negative effect of these overly narrow defences therefore disproportionately affects women, more so than men, even though on the face of it, the defences are the same for both groups.

Such a mirror comparator analysis comparing female to male offenders

46 This argument was also made in relation to the disenfranchisement of prisoners: that imprisoned people equally suffer the loss of the right to vote so there is no differential impact in relation to Māori. For consideration of this argument see Selwyn Fraser "Māori qua what? A Claimant-Group Analysis of *Taylor v Attorney-General*" [2017] NZ L Rev 31 at [40]–[48].

47 *Withler*, above n 38, at [57].

48 See also Susan Edwards "'Demasculising' the defence of self-defence, the 'householder defence' and duress" (2022) 2 CrimLR 111 at 128: "… such defences [duress and self-defence] are rarely pleaded by women victim/survivors of domestic abuse and coercion, and if pleaded acquittals are rare".

49 Tolmie and others, above n 1, at 132.

could also predetermine the outcome: "it artificially rules out discrimination at an early stage of the inquiry".[50] Instead of looking at the mere absence of difference, therefore, substantive equality requires "look[ing] at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage".[51] Indeed, it may be "the essence of … [a] group's equality claim … that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison".[52]

A non-mirror comparator may therefore be a preferable approach. This would involve a group not in precisely the same circumstances as the claimant group, but one that is in sufficiently analogous or comparable circumstances save for the prohibited ground. For example, if another defence (such as self-defence) is more readily available than the duress defences, and men avail themselves of this defence more than women, this could indicate discrimination.[53]

Again, the difficulty with both the mirror and non-mirror potential comparators is the lack of available data. For the mirror comparator, data would be helpful to show the defence requirements are more likely to be satisfied when under coercion from a complete stranger (although this is likely to be the case, because all the coercive circumstances in such a case can be found relatively close to the offending), and that men are more likely to experience coercion from strangers or non-intimate partners. More data would be needed here on how many men commit offences under such coercion. The data we do have suggests that men are more likely to experience violence (and therefore perhaps also violent coercion) from other men and, unlike for women, this violence is more likely to come from strangers than people known to them.[54] For men, again unlike women, even when this violence comes from those who are known to them, in most cases this will not be a family member or

50 *McAlister*, above n 13, at [51].

51 *Withler*, above n 38, at [40].

52 At [59]. A similar argument succeeded in *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] 1 WLR 1454 where it was held that no comparator (such as an ill man) was needed in relation to (direct) pregnancy and maternity discrimination.

53 Thank you to Kris Gledhill for this suggestion.

54 Such data as is available is from Australia. See, for example, Australian Bureau of Statistics "Personal Safety, Australia" (15 March 2023) <www.abs.gov.au>.

intimate partner.[55] Alternatively, data that showed that most of the crime-compelling occurs in IPV circumstances (if such data existed) would reveal disproportionality. This would involve looking at all cases of coercion, not just coercion in an IPV context. In relation to the non-mirror comparator, data would be helpful to show that men are more likely to be able to raise alternative defences (such as self-defence) than women.[56]

The courts in New Zealand also may prefer the mirror approach and one that emphasises formal, rather than substantive, equality. This indicates that a challenge to the duress defences based on discrimination would have a difficult time succeeding. The Court of Appeal in *Ngaronoa v Attorney-General* rejected the argument that disqualifying prisoners from registering to vote amounts to discrimination on the basis of race under s 19 of the NZBORA because it materially disadvantages Māori prisoners and Māori people generally.[57] The Court found that there was no discrimination because "non-Māori prisoners are treated the same way as Māori prisoners. Neither can vote. The policy does not have the effect, directly or indirectly, of treating the two groups differently".[58] Given that the prohibition on discrimination was aimed at achieving equality, "Māori sentenced prisoners end up placed in a position of exact equality as against the non-Māori sentenced prisoners".[59] Taking a broader view of the comparator group — the Māori voting community compared to the non-Māori voting community — the voting disqualification has a differential effect in proportional terms because a greater percentage of the Māori population are in prison.[60] However, the Court found that this difference was not discriminatory

55 Australian Bureau of Statistics, above n 54. New Zealand does not have similar published data, although the Crime and Victims Survey does suggest that women are twice as likely as men to experience offending by family members and four times more likely to experience offending from an intimate partner: Ministry of Justice *New Zealand Crime and Victims Survey: Key Findings Booklet, Cycle 4, November 2020–2021* (2022) at 12.

56 Such data does not exist. However, it is interesting to observe that in Victoria, Australia, when the offence of "defensive homicide" existed (essentially to capture cases of excessive self-defence in the context of family violence), the majority of those who were convicted of defensive homicide were male and in the majority of cases the circumstances did not involve prolonged histories of family violence victimisation: Kate Fitz-Gibbon "The Offence of Defensive Homicide: Lessons Learned from Failed Law Reform" in Kate Fitz-Gibbon and Arie Frieberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) 128.

57 *Ngaronoa*, above n 8.

58 At [137].

59 At [140].

60 At [147].

because it did not impose a material disadvantage on Māori: the numbers involved were small, with less than one percent of Māori in prison.[61]

The low number of women affected by this law (compared to the overall population) may also mean, therefore, that the second stage of the *Atkinson* test is not met. As explained, the claim in *Ngaronoa* also involved a disadvantaged group (Māori) in the criminal justice system, and yet the Court of Appeal found there to be no material disadvantage because, in terms of the overall number of voters, the difference between Māori and non-Māori voters was not sufficiently significant given than less than one percent of either group was in prison.[62] The Court also expressed concerns about the floodgates opening to other discrimination challenges in the criminal justice context if that one succeeded.[63]

This article's sketch of a comparator analysis has shown how the comparator framework could be said to "favor clearly defined and identifiable categories and, relatedly, disfavor sociologically oriented inquiries".[64] It shows that the problems with the duress defences do not fit easily into the requirements for a successful discrimination complaint. The comparator exercise will be the most significant barrier because of its unsuitability to complex social realities, particularly where more data is needed to support the claim of disparate effect. It thus prevents recognition of certain types of discrimination or inequality. Nonetheless, it persists as a requirement of discrimination possibly because it allows courts to avoid a substantive assessment of the practice, policy or law at issue. It means the courts do not have to confront the substantive inequality of this law.

VI JUSTIFICATION FOR THE LIMITATION

Once prima facie discrimination is identified, the next question is whether the differential treatment (in other words, the limitation on the right to freedom from discrimination under s 19 of the NZBORA) can be justified under s 5 of the NZBORA. It may not be easy, or even desirable, to separate out the identification of discrimination from its justification; there may be a "blurred

61 At [148]–[149].
62 At [148].
63 At [138].
64 Goldberg, above n 27, at 740.

line" between the two.[65] Moreover, a finding of non-comparability in the first step, for example, that men and women are not alike because one is stronger, can risk assuming the validity of the justifications for the differential treatment.[66] Nonetheless, the courts (aware of this potential "justification creep") see issues of justification as separate from the identification of discrimination.[67] This is largely because of the structure of the NZBORA, where the right to freedom from discrimination is contained in a separate provision (s 19) to that which permits justifiable limitations (s 5).[68]

Section 5 asks whether the treatment is a reasonable limitation on the prohibition against discrimination. To be a reasonable limitation, it must be a proportionate means of achieving a legitimate aim.[69] In the case of judicially developed compulsion laws, a s 5 analysis would also require engagement with the s 6 interpretation obligation. We have already explained how the policy justifications for the compulsion law restrictions typically do not fit the context of offending by victim-survivors of IPV. In the United Kingdom, Lord Rodger has raised similar concerns:[70]

> It is one thing to deny the defence to people who choose to become members of illegal organisations, join criminal gangs, or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape. I do not believe that this limitation on the defence is aimed at battered wives at all, or at others in close personal or family relationships with their duressors and their associates, such as their mothers, brothers or children.

As such, there may be no rational connection between the objective of the restriction and the measures taken. This would mean that these restrictions cannot be justified under s 5 unless a rights-consistent interpretation — one that does not discriminate against women — can be given using s 6. The Supreme Court in a recent case on the use of this interpretative obligation in the context of criminal law, *Fitzgerald v R*, said it creates "a starting

65 Charlie Cox "The Majestic Equality of Disenfranchisement: Assessing the Right to Freedom from Discrimination in Light of the *Ngaronoa* Litigation" (2020) 51 VUWLR 27 at 41.

66 At 39–40.

67 *Atkinson*, above n 8, at [132].

68 *Hoban,* above n 23, at [23]–[24].

69 Any analysis would likely follow the approach in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

70 *Hasan v Z* [2005] UKHL 22, [2005] 2 AC 467 at [78].

presumption that a rights-consistent meaning should be given to enactments where the application of that enactment to a particular case engages the affirmed rights and freedoms".[71] The Supreme Court explained that a "rights-consistent meaning must only be possible — it need not be the most likely meaning or even a likely meaning".[72] While a rights-consistent meaning must not entail a refusal to apply the legislative provision at issue,[73] a rights-limiting measure resulting from judicial interpretation does not raise the same concerns for Parliamentary sovereignty. The courts are familiar with revisiting their own interpretations to give rights-consistent interpretations as NZBORA jurisprudence has developed.[74] As such, if a court were to find the interpretations of the compulsion and duress defences to be discriminatory, there would be an obligation to revisit these interpretations to ensure they were rights-consistent.

VII INTERSECTIONALITY

So far we have set out the framework for establishing discrimination on the grounds of sex (single-axis discrimination). However, an intersectional discrimination claim could better capture the most serious wrong that occurs when victim-survivors of IPV who offend (or are held liable under the expansive party liability laws for their abusive partner's offending) are not given access to a defence that acknowledges, and realistically appraises, the coercion that they were operating under.

As noted in our first article, the issues explored in this article disproportionately affect Māori women in precarious situations, who are over-represented both as victim-survivors of family violence[75] and in incarceration.[76]

71 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [48].

72 At [58].

73 At [65]–[66].

74 See *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; and *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

75 Māori women are twice as likely as other women to experience violence from a family member: Ministry of Justice *New Zealand Crime and Victims Survey: Section 5: Sexual Violence and Violence by Family Members* (June 2022) at 4.

76 Department of Corrections *Wāhine – E rere ana ki te pae hou: Women's Strategy 2021–2025 (2021)* at 7. Discussing the "sex plus" approach in *H v E* (1985) 5 NZAR 333 (EOT), which also captures some notion of intersectionality, Mize, above n 14, at 42, observes that a ban on hiring smokers will disadvantage Māori women more than groups with lower rates of smoking, including Pakeha women or Māori men.

Māori women are, in common with other women relative to men,[77] more likely to be the victim-survivors of IPV.[78] Further, they are disproportionately subject to IPV entrapment[79] and are therefore more likely to offend under this form of coercion than other women in New Zealand.[80] Māori women are also more likely to be in the category of New Zealanders who bear the brunt of criminal victimisation in New Zealand.[81] In common with Māori men, Māori women in positions of precarity are more likely to receive a punitive criminal justice response than women who do not share their race and class. This effect is more extreme, however, than that experienced by Māori men.[82] Interestingly, the comparator group that presents the strongest challenge to the claim that a lack of access to the duress defences in circumstances of IPV is sex discrimination is male offenders who offend under violent coercion in consequence of gang membership (although, we know little about whether this is common, or whether and how coercion in that context might differ from IPV coercion and how this would affect the raising of a legal defence). However, this group of men, like the women who are criminalised for offending under IPV coercion, are also disproportionately Māori and likely to be in positions of socioeconomic precarity.[83] As such, they would not be an appropriate mirror comparison for a discrimination claim based on the intersection of race, gender and class.

77 As Shreya Atrey notes, intersectional discrimination involves tracking both "sameness and difference in patterns of group disadvantage": *Intersectional Discrimination* (Oxford University Press, Oxford, 2019) at 177–179.

78 Females were four times more likely as males to have experienced offending by an intimate partner and twice as likely to have experienced offending by another family member: *New Zealand Crime and Victims Survey*, above n 55, at 12.

79 See Family Violence Death Review Committee, above n 1, at 54. The report stated that 69 percent of the female primary victims who killed their abusive partners were Māori women. Māori women in positions of precarity face unique and extreme forms of social and systemic entrapment: Denise Wilson and others *E Tū Wāhine, E Tū Whānau: Wāhine Māori keeping safe in unsafe relationships* (Taupua Waiora Māori Research Centre, 2019).

80 See Family Violence Death Review Committee, above n 1, at 38–44 and 54.

81 Most New Zealanders who are victims of crime have only one experience of victimisation. Research shows that 38 percent of New Zealanders experience two or more victimisations and these victims account for 73 percent of criminal victimisations, whilst a smaller subset of two percent experience 39 percent of crime. Crimes by family members were the most common category of repeat victimisations. See Ministry of Justice *New Zealand Crime and Victims Survey: Section 8: Distribution of Crime* (June 2022) at 7–8.

82 For example, Māori constitute 53 percent of the male prison population but 67 percent of the female prison population: Ministry of Justice *Long-term Insights Briefing on Imprisonment in Aotearoa: Public Consultation* (June 2022) at 4.

83 For example, 72–77 percent of those on the New Zealand Police's National Gang List identify as Māori: New Zealand Parliament "New Zealand gang membership: A snapshot of recent trends" (25 July 2022) <www.parliament.nz>.

As explained by Shreya Atrey, writing about the international context, constructing an intersectional claim of discrimination on the grounds of sex, race and class (understood in terms of precarity) is difficult within the current framework of discrimination laws — an "apparatus conceived for single-axis discrimination".[84] Intersectional discrimination also exposes the flaws in a comparison-based approach. Amanda Reilly has explained how a comparison-based approach can be problematic when it comes to responding to intersectional discrimination. Rather than recognising cumulative disadvantage based on the intersection of identities, it requires Māori women, for example, "to argue a distinct claim with regard to each legal identity because, as currently constructed, the law can only focus on one factor at a time".[85] Atrey argues, however, that an intersectional claim is not impossible or without precedent, although it might require a "recalibration" of discrimination laws. In the New Zealand context, Mai Chen has pointed out that nothing in the NZBORA precludes an intersectional claim.[86] Chen raises the possibility that an intersectional claim, such as that discussed here, could also be made under art 3 of the Treaty of Waitangi.[87]

VIII CONCLUSION

Our two articles have explained how the current duress defences exacerbate existing inequalities for women and fail to accommodate the type of coercion that women are most likely to offend under. In our first article, we suggested that the reason why female offenders in relationships with violent partners find it harder to avail themselves of these defences is because the legal requirements do not reflect the practical reality of their lives. The circumstances that lead to their offending — and the distinct features of IPV — are the very circumstances that do not afford them the benefit of the defences. It is clear there is a need for lawmakers, both legislators and those who shape the common law, to craft and interpret criminal laws in a manner that allows victim-survivors of IPV equal access to justice.

Given the disproportionate effect the current operation of the laws has

84 Atrey, above n 77, at 210.

85 Amanda Reilly "Māori Women, Discrimination and Paid Work: The Need for an Intersectional Approach" (2019) 50 VUWLR 321 at 331.

86 Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Superdiversity Centre, Auckland, 2021) at 22. See also Reilly, above n 85, at 328.

87 Chen, above n 86, at 23. Note that Wai 381, the "Mana Wāhine claim", is currently under consideration by the Waitangi Tribunal.

on women — Māori women in circumstances of precarity in particular — we have attempted in this article to craft an argument using discrimination law to address this justice gap. We believe this argument could, and *should*, be made, although technical hurdles will need to be overcome in the form of the comparator analysis and availability of statistical data. Unfortunately, the technical nature of discrimination law can mean that what are in fact moral determinations are "often masked as empiricism and common sense".[88] This means that, as the law currently stands, the duress defences are unavailable to women in the circumstances when they are most likely to need them and, at the same time, discrimination law will struggle to respond to that justice gap.

88 Cox, above n 65, at 34.

BLURRED LINES AND STRIPPED LEGAL RIGHTS: THE APPLICATION OF LAW IN THE WORKPLACE EXPLOITATION OF STRIPPERS

Rosemary Hayden*

Stripping is legal and legitimate work. Yet blurred lines in the law are leaving those who work in strip clubs as dancers vulnerable to workplace exploitation. Classed as independent contractors who do not come under the legal definition of a "sex worker", strippers navigate a legal grey area where they are not entitled to legal protections in the workplace. This article illustrates the intersection between the widespread abuse in the stripping industry and the law's inability to take into account gendered and sexualised dimensions of labour. This issue needs urgent attention because the exploitation occurring in strip clubs is under-researched and ongoing; the most recent example being the mass firing of 19 strippers in February 2023 which culminated in a petition to Parliament. Significantly, the barriers for women asserting their rights in the workplace and their ability to rely on the law to adequately respond demonstrates a continuing influence of traditionally patriarchal power structures. The continued imposition of these structures genders the industry and defines the subordinate status of this work. Ultimately, this article will conclude the law is complicit in the workplace exploitation of strippers. The historical male bias embedded within legal structures does not define sexualised and gendered work as "real work" worthy of protection. Without Parliamentary action, the law will remain responsible for the continued exploitation of women who deserve to feel safe at work.

I INTRODUCTION

Everyone deserves entitlement to legal rights and protections in the workplace. However, blurred lines in the law are failing to protect those who work in strip clubs from abuse and exploitation. Under employment law, strippers fall into a grey area between contractors and employees. Although socially considered part of the sex industry, strippers do not qualify as sex workers under the law. As a result, they do not come within legislation regulating either employees or the sex industry. This article argues this is because the scope of established

* The author would like to thank Dr Katherine Doolin for her supervision in writing this article.

legal tests cannot recognise the practical reality of a sexualised and gendered workplace. Strippers work defies categorisation when applying the current binary nature of employment law. This issue urgently requires Parliamentary reform. Exploitation of workers in strip clubs occurs every day. Most recently, in February 2023, 19 women were collectively fired by Calendar Girls, which culminated in public protest and a petition to Parliament. This article concludes that legally blurred lines are leading to the law's complicit participation in the exploitation of these workers and the resulting erosion of their rights.

With this in mind, Part II briefly details the methodology and limitations of this article before Part III explains what is encompassed in being a dancer at a strip club, including the societal stigma and exploitation faced as a result of the job. Workplace exploitation will be outlined through evidence from workers in the industry gathered from media interviews and articles. Part IV details the current approach of relevant employment law as it pertains to dancers in strip clubs, including the legal tests to determine workers' employment rights. Part V examines the response of employment law to strip club dancers' claims of employment exploitation by considering the 2018 Employment Relations Authority (ERA) case study of *Hamilton-Redmond v Casino Bar Ltd*.[1] Analysis of the case study will demonstrate current employment law is unable to address the gendered reality. Part VI considers the absence of strip club dancers from legislation designed to protect workers in the sex industry. This exemplifies how dancers fall through the gaps created by blurred lines in legislation designed to protect them. Part VII analyses why the law is incapable of accurately responding to the gendered and sexualised workplace of strip clubs. Using theory from Michel Foucault and feminists such as Catharine MacKinnon, this article argues that the law's application to the strip club industry is discriminatory owing to essentialism and a lack of intersectionality.[2] Finally, Part VIII proposes potential avenues for reform to rectify the inability of the law to respond to the exploitation of strip club dancers in the workplace.

1 *Hamilton-Redmond v Casino Bar Ltd* [2018] NZERA Christchurch 128.

2 Michel Foucault *The History of Sexuality, Volume 1: An Introduction* (Random House, New York, 1978); Michel Foucault *Discipline and Punish: The Birth of the Prison* (Vintage Books, New York, 1979); and Catharine MacKinnon *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge (Mass), 1989).

II METHODOLOGY AND LIMITATIONS

The workplace exploitation of dancers in strip clubs is vastly under-researched in Aotearoa New Zealand. There is one case in New Zealand regarding strippers' employment rights and one academic article which criticises that decision.[3] Academic research on the sex industry tends to focus on sex workers, of which strippers are not usually included. Overseas research tends to focus on the sociological implications of stripping rather than their legal employment rights.[4] A lack of awareness around how this industry operates has silenced the majority of dancers, allowing it to remain unregulated.

For this article, accounts alleging the exploitation of strippers by club management have been gathered to supplement the allegations of exploitation in the case study of *Hamilton-Redmond*, which will be detailed in Part V. The accounts were gathered from a range of online sources of websites, newspapers and student magazines as well as a TVNZ documentary, published from 2018 until 2023. As such, the evidence used in this article to describe the work conditions and exploitation of strippers is often from untested sources. Accounts are mostly from those with first-hand experience working in strip clubs. Care has been taken to corroborate their accounts with evidence from other sources including the evidence presented in the *Hamilton-Redmond* case. However, these sources have not been peer-reviewed and are an acknowledged limitation of this article.

Although many allegations are heard through word of mouth, only a few women have spoken to the media about their experiences and mostly under pseudonyms. This article has deliberately chosen to use the names provided to the media, to represent complainants of exploitation as individuals rather than nameless "strippers". However, the names given are not the dancers' real names and instead are either stage names or pseudonyms.

III THE STRIP CLUB

A What is Encompassed by "Stripping"?

Generally, "stripping" entails erotic dancing whilst partially or totally removing

3 *Hamilton-Redmond v Casino Bar Ltd*, above n 1; and Amy Oliver and others "In the Nude: Factors Determining the Employment Status of Sex Workers" (2018) 24 CantaLR 91.

4 See Kim Price "'Keeping the Dancers in Check': The Gendered Organisation of Stripping Work in the Lion's Den" (2008) 22(3) Gender and Society 367; and Harley J Paulsen and Ericka Kimball "Exotic Dancers Experiences with Occupational Violence in Portland, Oregon Strip Clubs" (2018) 12(1) PSU McNair Scholars Online Journal 1.

clothes for payment.[5] Stripping commonly takes place at "strip clubs".[6] Anyone of any sex or gender can be a stripper, with the industry historically encompassing female, male and transgender dancers.[7] However, the industry tends to be dominated by young, female dancers as the majority of consumers are heterosexual men. This article refers to accounts of exploitation reported by the media from women. The author could not find any media coverage of exploitation focusing on groups such as men and members of the LGBTQIA+ and takatāpui communities working in the industry, or either of the two. Those who work in strip clubs can be known as "exotic dancers", "strippers" or "lap dancers".[8] This article will refer to them henceforth as "dancers" to encompass the range their work can entail.

Stripping incorporates an assortment of dancing including pole dancing and lap dancing.[9] The most common form of work in clubs is nightly "stage spots" where the dancer performs on a central stage.[10] Following their set, they will walk around the tables, collecting tips and sitting with clients.[11] Extra services can be purchased including lap dances, private room bookings or "full service".[12] During onstage performances, there is generally no touching of the dancers.[13] In private bookings, the dancer will outline the rules and boundaries that they are comfortable with before commencing service.[14]

Dancers earn their income through tips from clients and payments from extra services.[15] It is rare for dancers to be paid a wage by club management.[16] They are not paid for dances on the main stage.[17] If a dancer is tipped in "club

5 Faith Silcock "Uncovered: Stripping as an occupation" (2014) 28(1) Women's Studies Journal 68 at 68.
6 At 68.
7 See Redmer Yska "Nightclubs — Strip clubs" (5 September 2013) Te Ara — The Encyclopedia of New Zealand <https://teara.govt.nz>.
8 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [3].
9 Yska, above n 7.
10 Melody Montague "Tip Her: A Student's Guide to Wellington's Strip Clubs" *Salient* (online ed, Wellington, 2 March 2020). See also, Oliver Lewis "'Stripping was all I had': Former dancer exposes Calendar Girls' rules and fines" *Stuff* (online ed, New Zealand, 17 May 2018); and *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [59], [61] and [63].
11 Montague, above n 10.
12 Montague, above n 10.
13 Gabi Lardies "How to be the perfect strip club guest" *The Spinoff* (online ed, New Zealand, 23 June 2023).
14 Montague, above n 10.
15 Rayssa Almeida "Strippers paying thousands in fines, bonds to be able to perform: 'I was now losing money'" *RNZ* (online ed, Wellington, 23 September 2022).
16 Montague, above n 10.
17 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [61]; and Montague, above n 10.

money" it is taxed by the club before it is given to the dancer.[18] This results in irregular income where, for example, in one night a dancer could earn $2,000 or nothing.[19] As Melody explains, "[i]f you're not tipping, we're working for free. That's textbook exploitation."[20] Clubs often ask for thousand-dollar bonds from dancers in exchange for working on the premises.[21] Money from this bond or a dancer's wages can be deducted by the club under a fining system if a dancer violates club rules.[22] Fining is at the club management's discretion and an industry-wide practice.

These practices by strip club management can operate due to dancers being independent contractors rather than employees.[23] As a result, their work is not regulated by the Employment Relations Act 2000. This leaves a power vacuum, which clubs fill with their own rules and for which they are not held accountable. The status of dancers as independent contractors ensures that they have no recourse to legislative support if a problem arises such as an employment dispute. They also cannot resort to collective action or unionise, as independent contractors are not allowed to do so.[24] The distinction between the two legal employment status will be discussed further in Part IV.

B The Societal Stigma Surrounding the Stripping and Sex Industries

The issue of whether dancers are legally considered sex workers will be expanded upon in Part VI. However, dancers are socially considered workers in the sex industry due to working within sexualised environments.[25] Some strip clubs have attached brothels and some dancers may offer additional sexual services, although this is not the norm across the industry.[26]

18 Montague, above n 10.

19 Kate Iselin "Inside the life of a 19-year-old stripper" *New Zealand Herald* (online ed, Auckland, 27 July 2019).

20 Montague, above n 10.

21 Almeida, above n 15.

22 Susan Hornsby-Geluk "Strippers are vulnerable if they're not employees and not quite independent" *Stuff* (online ed, Wellington, 3 October 2018); and Almeida, above n 15.

23 Caitlin Clarke "Strippers are being coerced and abused — they're calling for better protection" *MetroNews* (online ed, New Zealand, 13 May 2022).

24 Commerce Act 1986, s 27; and Kelly Thompson "New Zealand Labour Law and Dependent Contractors: time to fill the 'grey zone'" (LLB (Hons) Dissertation, University of Otago, 2021) at 41.

25 See the labelling of dancers as sex workers in Almeida, above n 15; and a dancer referring to her work as being in the "sex industry" in Montague, above n 10.

26 Montague, above n 10.

Regardless of offered sexual services, those who participate in these practices are often labelled immoral due to the divergence with society's sexual norms.[27] This perceived immorality is often additionally accompanied by workers who face intersectional stigma due to other elements of their identity, such as being homosexual, transgender or a person of colour.[28] For example, women who strip are socially seen as deviant due to the stigmatised, sexualised nature of their work.[29] "Overt displays of female sexuality" can be stigmatised as they conflict with the societal perception of masculine sexual dominance and virtuous, submissive femininity.[30] The failure to adhere to societal norms means those working in sexualised industries are "othered"[31] and ostracised from mainstream society.[32]

These sexual and stereotypical stigmas as well as the association of the sex industry with crime result in both the societal vilification *and* victimisation of dancers.[33] Offering sexual services for money is perceived to diminish the worth of the women involved. The threat of the "deviant" sexual practices offered, as well as the allure the strip club poses to men, threatens societal norms of sex and family and so, the dancer is a villain. Dancers, however, are also seen as victims, without choice in constrained circumstances, who need to be saved. This is partially because sex work is segregated by gender, ethnicity and class. Those from lower socioeconomic backgrounds and indigenous people from colonised countries are over-represented in the sex industry.[34]

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27 Marie-Louise Janssen "Sex work activism and intersectionality: The role of stigma in uniting sex workers" in Jeanett Bjønness, Lorraine Nencel and May-Len Skilbrei (eds) *Reconfiguring Stigma in Studies of Sex for Sale* (Routledge, London, 2021) 81 at 84.

28 See Janssen, above n 27, at 84 and 86.

29 See Hanna McCallum "The 'unchecked power' of strip clubs and the workers pushing back" *Stuff* (online ed, Wellington, 25 March 2023); and Asia Martusia King "Why Aotearoa's strippers are so fired up and standing out" *1News* (online ed, New Zealand, 11 March 2023).

30 Jane Scoular *The Subject of Prostitution: Sex Work, Law and Social Theory* (Routledge, Abingdon, 2015) at 33.

31 "Othering" refers to the process by which minorities are marginalised by being defined as not included in the dominant social group of "us". This distinction in membership defines the identities of those in the groups of "us" and "the other", often creating disparities in treatment. See Steve Matthewman, Catherine Lane West-Newman and Bruce Curtis (eds) *Being Sociological* (2nd ed, Palgrave, London, 2013) at 407.

32 Scoular, above n 30, at 79–80.

33 Lisa Fitzgerald and Gillian Abel "The media and the Prostitution Reform Act" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 197 at 199.

34 Gillian Abel and Lisa Fitzgerald "Introduction" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 1 at 10.

Whether villain or victim, stripping as a job continues to be perceived as shameful. The othering of dancers removes them to the margins of society where they are often overlooked by the law. Stigmatisation reduces their autonomy because dancers are categorised either as an exploitable commodity or as needing to be saved. In contrast, going to a strip club is generally seen as a more normal practice for men. Essentially, there is a societal double standard in how workers in strip clubs and the sex industry are perceived. The presumption is that the mostly female dancers must be lacking in self-worth and self-respect to participate in these "immoral" services, although those "immoral" services exist to meet men's sexual demands.[35]

To offer these services, dancers hypersexualise themselves and conform to an exaggerated performance of patriarchal gender norms. Some feminists would argue for the abolishment of the legalisation of stripping and the wider sex industry as a result.[36] Other feminists would argue these individuals are simply getting paid for services most women "give for free".[37] This article takes the view that women and others who choose to work in strip clubs are acting with agency. Performing gender norms or catering to the patriarchal bargain in itself does not make these workers vulnerable. The vulnerability of workers in the stripping industry is underpinned by the law's inability to comprehend the highly gendered and highly sexualised nature of their reality when considering whether frameworks of legal protection should apply to them.

C Accounts of Exploitation

Alleged exploitation has occurred in Christchurch, Wellington and Auckland, indicating it is an industry-wide issue. The most common account of exploitation was through club fining systems. As these systems are discretionary, there is no regulation on how much or how often a dancer can be fined. For example, a dancer could be fined $200 *and* taxed 50 percent on all tips if they were rude to patrons or management — without specifying what

35 Jan Jordan "Of whalers, diggers and 'soiled doves': a history of the sex industry in New Zealand" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 25 at 38.

36 See Sheila Jeffreys *The Idea of Prostitution* (Spinifex Press, Melbourne, 1997) at 6, as cited in Alison Laurie "Several sides to this story: feminist views of prostitution reform" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 85 at 89.

37 Frederique Delacoste and Priscilla Alexander *Sex Work: Writings by Women in the Sex Industry* (Virago, London, 1988) at 273, as cited in Scoular, above n 30, at 102.

rude conduct would entail.[38] Dancers being fined is a common occurrence.[39] Dancers have reported being fined when they are sick and unable to work, once even when a dancer provided a required medical note.[40] Fines are taken directly out of tips and severely impact how much a dancer earns in a night.[41] The fear of being fined forces dancers to tolerate unacceptable working environments. As Rosie states:[42]

> If a customer is being pushy with your boundaries and you let him do whatever it is that he wants for risk of being fined for being rude, then if another girl reports you for 'doing extras' because you let him touch you in that way or whatever, then you'll get fined again. Because you're doing extras. … You can't win. … The club wins every time.

Studying media accounts, attitudes by club management towards dancers' welfare demonstrate a coercive style of exploitation. In private rooms, dancers are alone with their clients, with only a panic button due to a lack of bouncers.[43] Although dancers choose which clients to accept, circumstances can change in confined, and sometimes locked spaces,[44] and dancers cannot easily get out. Tasha states that:[45]

> Young women aren't taught how to say no or how to enforce themselves, so when you get young 18 to 20-year olds with men who are older and know how to manipulate a situation, you get some problematic scenarios.

A common "problematic scenario" is sexual assault. An example is when 19-year-old Violet bent over in front of a client in a private room and he "forced his fingers inside her", ignoring her instructions not to touch her.[46] Sexual assault is also embedded within the club's structural hierarchy. Some clients pay

38 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [14(h)].

39 See Kristin Hall "NZ strippers allege exploitation and wage theft" *1News* (online ed, New Zealand, 2 April 2023) at 44:44; and King, above n 29.

40 See Almeida, above n 15; Oliver Lewis and Sam Sherwood "Industry experts say strip club fines 'commonplace'" *Stuff* (online ed, Wellington, 17 May 2018); and "Strippers unveil petition at Parliament: 'We have been silenced for so long'" *RNZ* (online ed, Wellington, 10 March 2023).

41 Almeida, above n 15.

42 Hall, above n 39, at 11:10.

43 Clarke, above n 23; and Hall, above n 39, at 2:32 and 2:41.

44 Clarke, above n 23.

45 Clarke, above n 23.

46 Iselin, above n 19.

seasoned dancers to drug new dancers.[47] Dancers allege management is aware of these issues which blur the line between legal and criminal conduct but ignore them to maximise profit.[48] Strip clubs prioritising profit over dancers' welfare was echoed in another allegation from Tasha where, in Wellington:[49]

> [A] girl got drugged and taken home but management didn't do anything about it until 5am because they didn't want business to be ruined by police coming in the club.

Any notion of formally complaining about exploitative or possibly criminal conduct within strip clubs is unrealistic. Strip club management is male-dominated.[50] Clubs are often overseen by one individual, resulting in a monopoly over power and influence within the club.[51] As a result, there is no complaints procedure available which does not directly involve the person responsible for both the situation and the dancer's continuing income.

An external complaint is also unrealistic. In 2022, WorkSafe told a Dreamgirls dancer to raise concerns about her working conditions with her employer, who also happened to be the alleged perpetrator of the dancer's concerns.[52] Similarly, the complaint process to the sex workers' union requires involving management and obtaining statements from multiple employees.[53] The dancers are "really replaceable" and the risk of losing their job is too high to do anything other than tolerate strip club management's "very abusive behaviors".[54]

IV EMPLOYMENT LAW: DETERMINATION OF EMPLOYMENT STATUS

This Part will outline how employment status is currently determined in New Zealand law. The binary nature of New Zealand employment law results in an inadequate classification of workers. This has implications for workers' rights

47 Clarke, above n 23.
48 See Clarke, above n 23; Ireland Hendry-Tennent "Wellington stripper compares club contracts, coercive fines to 'sex slavery' amid battle for better protections" *Newshub* (online ed, New Zealand, 25 June 2023); and McCallum, above n 29.
49 Clarke, above n 23.
50 Silcock, above n 5, at 68.
51 Clarke, above n 23.
52 King, above n 29.
53 Clarke, above n 23.
54 Clarke, above n 23.

and legal protections. The case of *E Tū Inc v Rasier Operations BV* provides an example of how the courts apply the relevant legal tests to determine employment status.[55]

A Current Employment Law

Under New Zealand employment law, whether an individual is an employee or an independent contractor determines the rights and benefits that they are entitled to regarding their work. In an unregulated labour market, capitalism aims to reduce labour costs to create as much surplus profit as possible, which comes at the cost of worker exploitation.[56] Employment law aims to balance that need to generate profit by providing for workers' rights. This is done by legislating a relationship of rights and obligations between the worker and the employer to ensure good faith.[57]

Section 6(1) of the Employment Relations Act defines an employee as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". Employees have a range of statutory rights including the right to bring a personal grievance against their employer to the ERA and, if applicable, then the Employment Court.[58] These entitlements exist because employees are economically dependent on their employers.[59] This vulnerability and the power imbalance within the employer-employee relationship mean employees require legal intervention and protection.[60]

In contrast, independent contractors retain agency over their labour. Independent contractors set their hours and their pay rate and are considered to have equal bargaining power.[61] If they are unable to reach agreed terms, unlike an employee, they can take their labour to other clients and not be detrimentally affected.[62] Therefore, independent contractors do not need the

55 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, [2022] ERNZ 966.

56 See Ciara Cremin *The Future is Feminine: Capitalism and the Masculine Disorder* (Bloomsbury, New York, 2021) at 86–87 and 98.

57 See Employment Relations Act 2000, s 3(a)(i).

58 Employment Relations Act, ss 102, 103(1), 105(1), 157(1), 179(1) and 187.

59 Stephanie Hill "The Employment Relations Act and Dependent Contractors: A Real Relationship?" (2004) 10 Auckland U L Rev 143 at 144–145.

60 Guy Davidov *A Purposive Approach to Labour Law* (Oxford University Press, Oxford, 2016) at 48, as cited in Thompson, above n 24, at 8; and Employment Relations Act, s 3(a)(i) and (ii).

61 Hill, above n 59, at 146.

62 Davidov, above n 60, at 45 and 47, as cited in Thompson, above n 24, at 8.

equivalent level of protection that employees require, enjoying only basic statutory protection in respect of health and safety, and human rights.[63]

To determine whether someone is an employee or an independent contractor, the relevant authority must determine "the real nature of the relationship between [the parties]" and "must consider all relevant matters".[64] Contracts, intentions and other statements of the parties are not determinative of the nature of the relationship.[65]

The ERA and the Employment Court use established legal tests to determine an individual's employment status. The relevant legal principles were summarised in *Bryson v Three Foot Six Ltd.*[66] As Kelly Thompson explains, "[t]he control test examines the right the employer has to control the individual worker. The more control there is, the more likely the worker is to be an employee".[67] Under the integration test, an employee's work would be fundamental to the business whereas an independent contractor's work would usually be supplementary.[68] The fundamental test analyses the entire work relationship to determine its economic reality.[69] Finally, the intention of the parties and industry practice are also relevant factors.[70]

B Dependent Contractors

It is clear from the statutory and common law tests that New Zealand employment law is binary. You are either a protected employee or an independent contractor. However, the two categories are difficult to distinguish.[71] The tests do not remove uncertainty and how exactly to determine "whether a relationship is one of employee or independent contractor" has not been clarified.[72] The class of workers in the grey zone is increasing with the rise of the

63 Hill, above n 59, at 146.
64 Employment Relations Act, s 6(2) and (3)(a).
65 Section 6(2) and (3); and *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (NZEmpC) at [19].
66 *Bryson v Three Foot Six Ltd*, above n 65, at [19]. The Employment Court summarised the principles laid out in *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (NZEmpC) and *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 (NZEmpC). That summary was endorsed on appeal by the Supreme Court: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] ERNZ 372 at [31]–[33].
67 Thompson, above n 24, at 10.
68 Employment New Zealand "Contractor versus employee" <www.employment.govt.nz>.
69 Employment New Zealand, above n 68.
70 *Bryson v Three Foot Six Ltd*, above n 65, at [19].
71 Guy Davidov "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002) 52 UTLJ 357 at 358, as cited in Thompson, above n 24, at 4.
72 Thompson, above n 24, at 10, citing Alexander Szakats *Law of Employment* (2nd ed, Butterworths, Wellington, 1981) at 24.

gig economy, which prioritises temporarily hiring independent workers when needed rather than retaining nine-to-five employees.[73] Some workers prefer the freedom the gig economy allows them. However, traditional employment law tests struggle to classify workers who "in form comprise independent contractors, but in substance function as employees", leaving them "in the unsatisfactory predicament that the courts may deny them the benefit of employment protection laws".[74]

A worker who falls within this grey zone between being an employee and an independent contractor is known as a dependent contractor. Essentially, a dependent contractor is self-employed but lacks autonomy,[75] with some of the characteristics of independent contractors and some of the vulnerabilities of employees.[76] As a result, dependent contractors do not qualify for any employment law protections and are at risk of exploitation.[77]

This category is most similar to dancers because they can choose their hours and technically can refuse work. However, due to restraint of trade clauses in dancers' contracts — stipulating that dancers may be subject to penalties if they work for another establishment — dancers are usually financially dependent on a single strip club, without the ability to seek work elsewhere. They do not set their pay rate and are not protected by any laws governing breaks or leave. There is a clear power imbalance between the strip club and the subordinate contracting position of the dancer. This does not reflect the status of an independent contractor and decreases the dancer's agency over their labour.

C The Uber Example

The decision in *E Tū Inc v Rasier Operations BV* highlighted the tension regarding the employment rights of potentially dependent workers.[78] The issue was whether the applicants (four men who drove for Uber) were employees or independent contractors. Uber argued that the men were independent

73 Thompson, above n 24, at 17.

74 Hugh Collins "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10(3) OJLS 353 at 355, as cited in Thompson, above n 24, at 5; and see Thompson, above n 24, at 4 and 17.

75 John Hughes *Mazengarb's Employment Law (NZ)* (online looseleaf ed, LexisNexis) at [ERA6.4], as cited in Thompson, above n 24, at 20.

76 Davidov, above n 60, at 136, as cited in Thompson, above n 24, at 20.

77 Thompson, above n 24, at 20 and 22.

78 *E Tū Inc v Rasier Operations BV*, above n 55.

contractors because Uber was merely the intermediary platform used to create a contractual relationship between the driver and the customer.[79] Despite noting the absence of elements of a traditional employment relationship, the Court found the drivers were employees.[80]

Acknowledging the "rapidly evolving labour market" and the issues this may pose in trying to apply a binary law,[81] the Court outlined the purpose of employment legislation, which it said reflects:[82]

> … a statutory recognition of vulnerability based on an inherent inequality of bargaining power, that certain workers are unable to adequately protect themselves by contract from being underpaid or not paid at all for their work, from being unfairly treated in their work and from being overworked.

Any application of legal tests had to recognise this societal purpose rather than undermine it. Therefore, any assessment of the status of workers had to consider whether the individual in question was within the range of workers to which Parliament intended to extend employment protections, in the context of the modern labour market.[83] This suggests that the Court was aware of the need for the protection of dependent workers and that the real nature of the drivers' employment relationship was akin to a dependent worker. The judgment reflected this through the broad application and expansion of the legal tests in light of the legislative purpose. The binary nature of New Zealand employment law may have influenced the Court to choose the status of an employee rather than an independent contractor due to the legal protections provided.

The decision in *E Tū Inc* will now be compared to *Hamilton-Redmond v Casino Bar Ltd*, a determination of the ERA.[84] This will demonstrate that although both cases are arguably instances of dependent workers needing protection from the law, the inconsistencies in the application of the law that result are due to the contrasting sexualised and non-sexualised work environments.

79 At [31].
80 At [32] and [82].
81 At [4]–[6] and [9].
82 At [8].
83 At [9].
84 *Hamilton-Redmond v Casino Bar Ltd*, above n 1.

V CASE STUDY OF HAMILTON-REDMOND V CASINO BAR LTD

Hamilton-Redmond v Casino Bar Ltd was heard by the ERA in 2018.[85] This was the first case of its kind, and the ERA could not find any previous New Zealand case law about the employment status of dancers in strip clubs.[86] The importance of this determination cannot be understated. Cases involving dancers are unlikely, because club rules ban them from speaking about the running of the strip club or management, during and after their employment, under threat of legal action.[87] Although this case involved two individuals rather than consideration of the broader strip club industry,[88] it set a precedent and will be considered the status quo.

In 2017, Ms Tineill Hamilton-Redmond and Ms Jessica Clifford worked at Calendar Girls, Christchurch as dancers. Ms Clifford and Ms Hamilton-Redmond shared a flat and in September 2017, they experienced attempted break-ins at their property, as well as threats by unknown persons. Following this, the two women went to the police to make a complaint. Consequently, they both missed a night of work at the club.[89]

As a result of missing work, Ms Clifford was fined and then fired.[90] Ms Hamilton-Redmond was left off the roster and was not paid. Consequently, she resigned. The women took a personal grievance claim of unjustified dismissal against Calendar Girls to the ERA. The issue for the ERA was whether the applicants were independent contractors or employees.

The ERA stated the relationship between the dancers and the club was a "dependent contractor" relationship.[91] However, that status is not officially recognised in New Zealand law and the women were not under the degree of control necessary to fall on the side of an employee within the "binary division in operation in the world of work in New Zealand".[92] Therefore, the women were independent contractors.[93] This determination ignores the reality of the women's employment which lacked the autonomy of independent

85 *Hamilton-Redmond v Casino Bar Ltd*, above n 1.
86 At [55].
87 At [13].
88 At [125].
89 At [5].
90 At [5].
91 At [106].
92 At [132].
93 At [132].

contractors. The legal tests were incapable of being applied *accurately* to the women's circumstances because the scope of the tests, as currently framed, could not encompass the nature of the women's sexualised work. This will be demonstrated through an examination of the legal tests in question.

A Control Test

The conduct of the dancers was controlled through a restraint of trade contractual clause and a fining system. The ERA stated that the fining system would be "highly problematic and highly unusual" in an employment relationship.[94] Therefore, the ERA viewed it as indicative of independent contractor status.[95] Additionally, the ability of the dancers to refuse clients or hours of work distinguished them from employees because:[96]

> A dancer may choose to refuse to give a lap dance to a customer, or go with him to the penthouse, or on an outcall. She can also refuse to allow a customer to touch her, and can stipulate where he can and cannot touch her. It is her personal choice with no interference from management. By contrast, no employed shop assistant, say, could choose not to serve a customer without the permission of management.

Finally, control over the dancers' appearances was considered to be a neutral factor.[97] Dancers adhering to strict club rules such as wearing matching lingerie, having "immaculate" makeup and being naked by the end of their set were seen to be "mutually beneficial".[98] The ERA said that such rules protect and promote Calendar Girls' brand. The club is selling "sensuality, titillation and sexual excitement in a safe and comfortable environment".[99] Rules relating to appearance ensure the dancers' performance fulfils the promise the club is selling: "[t]hey are required to be in the nude … because female nudity is being sold".[100] They also help dancers maximise their profits through tips and private services.

However, the ERA's focus on the consequences of the degree of control exercised over the dancers rather than the degree itself has the implication

94 At [99].
95 At [99].
96 At [103].
97 At [98].
98 At [13] and [97].
99 At [94].
100 At [95].

of ignoring the power imbalance between dancers and management. This is contrary to legislative intention because although the control exercised over dancers such as enforcing longer hours and requiring certain appearances may result in benefits, it comes at the expense of dancers' autonomy. The ERA is implying excessive control of contractors is acceptable as long as it results in some benefit to the exploited. In contrast, the Court in *E Tū Inc* stated the control test was to determine "whether or not control is exerted and able to be exerted, not *why* it is exerted".[101] The benefit (if any) of this control for the worker is irrelevant to the test because it is too subjective.[102]

The failure of the ERA to consider the lawfulness of the fining system and take its existence as evidence of an independent contractor relationship detracts from the possibility that there may have been an employee relationship with an unlawful fining system.[103] Again, this approach seems to sideline concerns of power imbalances between the parties. The framing of the legal tests denied the ERA the ability to consider the reality of the relationship between the applicants and the respondent.[104]

In contrast, the power imbalance was the central focus of the control test in *E Tū Inc.* The Court found Uber exerted subtle control over drivers albeit through non-traditional means, and that Uber's operating model was designed to facilitate subordination of the drivers.[105] Such an approach to whether Calendar Girls' fining system was appropriate and lawful or only lawful would have been preferable, rather than considering the fining system non-traditional in an employment relationship and not questioning the issue further. To do so is to ignore the reality of the subordinate status of dancers due to the power imbalance in the club hierarchy.

The ERA's focus on the dancers' ability to refuse work or clients detracts from the reality of their work.[106] The dancers could only refuse *supplementary* work as they were not allowed to refuse to perform their core (unpaid) services.[107] If the dancers failed to strip naked by the end of their second song on stage or did not remain completely nude whilst collecting tips, they would

101 *E Tū Inc v Rasier Operations BV,* above n 55, at [58].
102 See Oliver and others, above n 3, at 96.
103 At 96.
104 At 96.
105 *E Tū Inc v Rasier Operations BV,* above n 55, at [43]–[44].
106 Oliver and others, above n 3, at 97.
107 At 97.

be fined.[108] Dancers are also required to immediately return to the main stage to dance if asked by management at any time or face a fine.[109] As dancers do not get paid for their stage routines,[110] this interferes with their ability to generate income by interacting with clients.

The ERA's comparison of dancers to shop assistants is flawed due to the fundamental reality of the dancers' jobs. If a shop assistant refuses to serve a customer, they will be reprimanded. If a dancer refuses to allow a client to touch them and the client persists, that may amount to criminal conduct.[111] If management forces dancers to perform supplementary services like a lap dance against their will, that is illegal. Under s 17 of the Prostitution Reform Act 2003 (PRA), despite anything in a contract to provide commercial sexual services, a person can refuse to provide such a service at any time. The sexualised nature of the dancers' work is not comparable to work in which refusal to perform services will not result in illegality. The ability of dancers to refuse unwanted advances is not a privilege or a demonstration of a lack of control by management. It is a right under the law and should be considered an irrelevant factor in this determination.

B Integration

The ERA determined that the dancers were integral to Calendar Girls' business but that they were not deeply integrated into the business.[112] Instead, Calendar Girls functioned as an "attractive and safe venue"[113] where the dancers could "sell … themselves" rather than a Calendar Girls product.[114] The ERA implied that the nature of the dancers' work results in their objectification rather than recognising the service they provide.

Dancers curate their style, providing their own clothing and makeup and do not wear branded Calendar Girls clothing like employed staff members.[115] However, Oliver and others tenably state "it is hard to imagine how, in any circumstances, the dancers could wear clothing to promote the Calendar Girls'

108 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [13].
109 At [64] and [13].
110 At [61].
111 See Crimes Act 1961, ss 128 and 135.
112 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [115].
113 At [97].
114 At [112].
115 At [110].

brand".[116] Even if the dancers wore branded clothing, the nature of their work means they would barely be wearing it before taking it off as per the club rules, which would result in minimal promotion for the Calendar Girls' brand.[117] Instead, dancers represent the club by reflecting the silhouetted naked woman wearing high heels promoted as the Calendar Girls logo.[118] Furthermore, the ERA stated that rules requiring dancers to wear sensual and sexy lingerie help to protect the club's brand.[119] By implication, the dancers are promoting the Calendar Girls' brand of sensuality "[w]hether naked or dressed in matching lingerie".[120] The emphasis on dancers needing to be clothed to promote the club's brand is "meaningless" when considering the nature of their work.[121]

This analysis is supported by that of the Employment Court in *E Tū Inc*.[122] The Court acknowledged the absence of "the indicia of integration" seen in more traditional employment relationships,[123] such as uniforms or signage, and noted that drivers provided their own cars and paid for resources like petrol, insurance, warrants of fitness and smartphones. The Court said the provision of cars was a neutral factor: it did not reflect "the sort of investment which might otherwise indicate that [drivers] were running their own business".[124] In fact, "all four drivers owned the required vehicle prior to considering applying to work for Uber".[125] This reasoning could be applied to makeup and shoes as they are common resources owned by the majority of women.

Objectification of dancers as the product was evident through the ERA stating that dancers were "selling themselves" for tips rather than a good or service of their employer as a shop assistant or wait staff would.[126] The ERA stated dancers use their "inherent sensuality" and "unique charms" to attract clients.[127] However, it is more accurate to say that dancers sell the product of sexual gratification rather than themselves.[128] Whilst the dancers perform using

116 Oliver and others, above n 3, at 99.
117 At 99.
118 At 99.
119 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [94] and [95].
120 Oliver and others, above n 3, at 99–100.
121 At 99.
122 *E Tū Inc v Rasier Operations BV*, above n 55.
123 At [65].
124 At [67].
125 At [69].
126 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [112].
127 At [112].
128 Oliver and others, above n 3, at 100.

their personalised charm, they all perform the same services of dancing and stripping.[129] Additional services such as lap dances are from a set list that does not vary. Dancers choreograph their personal routines, but all dancers must dance. Some clients may be attracted to certain dancers more than others, but their consumption of the product does not depend on that dancer. Personal characteristics are an additional bonus, not the purpose for which the client is there. In this way, the dancers can be compared to other workers who sell the same overall service but can be preferred based on their personal attributes.[130] Therefore, the ERA's perception of the product being sold was incorrect.

C Economic Reality

The ERA's analysis of economic reality does not accurately reflect a dancer's economic risk. The ERA stated Calendar Girls essentially acts as a trustee of dancers' money.[131] It reasoned that the fact Calendar Girls' profit varies depending on what service the dancers provide indicates a business relationship rather than an employment relationship. The ERA's acceptance of this degree of economic control over the dancers contrasts with the Employment Court's analysis in *E Tū Inc*.[132] Uber drivers receive the fare of the trip minus a service fee, the amount of which is determined by Uber and deducted before payment to the driver.[133] This is similar to the system used at Calendar Girls, where the club takes its cut before transferring the client's payment for services to dancers.[134] In *E Tū Inc*, the Court found Uber's "very hands-on involvement in fare setting and review" stood in contrast to its claim that the customer was in a direct contractual relationship with the driver.[135]

Applying the reasoning in *E Tū Inc*, there is a separate relationship between dancers and Calendar Girls from dancers and clients. Calendar Girls' profit does not solely rely on dancers' interactions with clients. The club controls the amount taken out of the dancers' tips and can deduct fines regardless of whether dancers interact with any clients. The ERA's assumption that Calendar Girls relies on dancers when, in fact, the reverse is true, reduces dancers' agency and therefore their similarity to independent contractors.

129 At 100.
130 At 100.
131 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [116].
132 *E Tū Inc v Rasier Operations BV*, above n 55.
133 At [35].
134 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [74] and [116].
135 *E Tū Inc v Rasier Operations BV*, above n 55, at [37].

Further similarity to independent contractors was outlined by the ERA by noting the economic risk taken on by the dancers. It is possible if no tips or additional services are provided, a dancer may make no money and lose the opportunity to have made money elsewhere that night. The ERA incorrectly contrasted dancers with shop assistants, who get paid regardless of whether they make any sales or not.[136]

However, the dancers take on this economic risk because they have to, not because they have a choice in preference. The dancers are subject to a restraint of trade and will be fined $2,500 if they work for another club.[137] This reality contrasts with the perception of independent contractors, who can work for multiple entities. Ignoring that dancers' choices are qualified within the constructs of their financial and social context, ignores their reality, in favour of the (often erroneous) assumption that other jobs are easily accessible.

Similar reasoning was employed by the Court in *E Tū Inc*, where a claim of flexible working hours was dismissed as "largely illusory",[138] stating that arguably every worker can choose not to work and face disciplinary consequences.[139] The Court said that "[t]he degree of weight that can sensibly be placed on the existence of worker choice depends on the circumstances".[140] In the case of the Uber drivers, placing "any real weight" on the fact they could technically have chosen not to work would be inconsistent with the workers' realities and "undermine the applicable protective statutory purposes".[141]

It is unlikely dancers' circumstances would be any different. Consideration of the stigma faced by dancers in the industry does not result in a multitude of options. After the *Hamilton-Redmond* case, one of the claimants "dropped out of a teacher training course after repeatedly being told no school would hire a former stripper".[142] Dancers theoretical choices are very much constrained by their practical realities.

Furthermore, if, on balance, the other tests found the dancers fell on the side of employee, assumingly the ERA would have ordered clubs to change their practices of only paying dancers where a service is sold. This is an example

136 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [119].
137 At [13].
138 *E Tū Inc v Rasier Operations BV*, above n 55, at [55].
139 At [59].
140 At [59].
141 At [59].
142 Adele Redmond "Ex-Calendar Girls dancers to appeal after ERA finds they were contractors, not employees" *Stuff* (online ed, Wellington, 26 September 2018).

of Calendar Girls simply maximising profits until they are required to change their practice rather than an indication of the real nature of the relationship.

D Industry Practice

Despite the applicants' lawyer urging that "poor practice does not make good law", industry practice was considered a relevant factor in *Hamilton-Redmond*.[143] In its conclusion, the ERA found industry practices, such as only paying dancers when they sold a service and the fining system, were "antithetical" to an employment relationship.[144]

One of the foundations of the ERA's finding was the evidence from Ms Jacqui LeProu, who had almost 30 years of experience in the industry.[145] Ms LeProu was recognised as an expert in the case despite being a former director of the respondent.[146] Ms LeProu stated that she had never heard of a dancer being an employee and that prices were set by the clubs for the dancers' safety.[147] Ms LeProu explained that because there is so little regulation around the industry, clubs are forced to create and enforce their own rules.[148]

The ERA also considered foreign judgments on the employment status of dancers, which it considered provided information about common industry practices.[149] As well as being commonplace in New Zealand, the ERA considered the prevalence of the fining system in the United Kingdom, Canada and the United States. Only in the United States did courts find dancers were employees rather than independent contractors and required clubs to pay them a minimum wage.[150] However, the ERA distinguished those cases partially because the degree of control exerted over the dancers was much more than in this case and the relevant test appeared to be narrower than the New Zealand test.[151]

143 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [124]–[125].
144 At [129].
145 At [18].
146 At [18]–[19].
147 At [20]–[23].
148 At [23].
149 At [43]–[54], citing *Canadian Labour Congress, Chartered Local Union Number 1689 (Canadian Association of Burlesque Entertainers) v Algonquin Tavern* [1981] OLRB Rep August 1057, *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 and *Hart v Rick's Cabaret International Inc* 09 Civ 3043 (PAE).
150 At [49], citing *Hart v Rick's Cabaret International Inc*, above n 149.
151 At [50]–[54].

In an otherwise unregulated industry, widespread practices indicated which behaviours were acceptable. This directly goes against the legislative purpose of protecting vulnerable workers from exploitative practices. In the absence of regulation, bestowing a degree of authority on industry practices reinforces the validity and normalisation of how these industries treat their workers. It is essentially affirming that as long as the exploitative practice is widespread, it is acceptable. This removes the ability to identify structural or institutionalised exploitation, rather than individual conduct. For this reason, *Hamilton-Redmond* was doomed from the start — the law was never able to comprehend the reality of dancers' workplaces and the sexualised nature of their work.

VI INCLUSION IN THE SEX INDUSTRY

This article has so far demonstrated that the structure and the scope of employment law are incapable of being accurately applied to reflect the realities of dancers in strip clubs. The binary division of independent contractor or employee does not reflect the vulnerable "freedom" of dancers, leaving them without any legal protections. The sexualised nature of their work is misunderstood, resulting in contrasting decisions regarding the protection of workers. Evidently, dancers cannot rely on employment law for legal protection.

Much like the blurry line between independent contractors and employees, the blurriness in whether strip club work is included within sex work results in a lack of recourse to the law and a vulnerability towards being exploited. Employment protections are offered to those in the sex industry through the Prostitution Reform Act 2003 (PRA). The PRA decriminalised commercial sex.[152] Notwithstanding that dancers work in a sexualised environment, often alongside brothels and face the same societal stigma as sex workers, it would appear that dancers are not considered sex workers under the PRA. Therefore, they are seemingly not under the Act's protection.

"Sex worker" is defined in the PRA to mean "a person who provides commercial sexual services".[153] "Commercial sexual services" means sexual services that:[154]

152 Before 2003, sex work was not illegal, but all related activities were criminalised. See Gillian Abel and others "The Prostitution Reform Act" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 75 at 75.

153 Prostitution Reform Act 2003, s 4(1).

154 Section 4(1).

(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and

(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person)

"Sexual acts" are not defined. The physical participation in lap dances, for example, could be held to be sexual acts. Oliver and others assumed dancers were sex workers in their critique of the case.[155] However, Community Law states that strippers are not included in the definition.[156] This is supported by the PRA's focus on "prostitution".[157] In relation to visas, Immigration New Zealand has held that dancing "may not fall under the definition of commercial sexual services".[158] The mechanical definition of sex as physical acts in the law results in blurriness as to whether services in strip clubs are considered sex work. An absence of discussion of dancers' rights as sex workers in case law or the industry seems to suggest strip club services are not considered sex work, or authorities are wilfully blind to that possibility.

The continued absence of dancers from frameworks of law results in the maximisation of profits for management and unfettered access to commodified dancers for consumers. Strip club management justifies their use of fining systems and coercive practices as necessary to regulate the unregulated industry.[159] In reality, the industry prefers to be unregulated to capitalise on exploited labour. The exploitation of dancers through an unbalanced power dynamic is a means to a very profitable end.

VII THE LIMITATIONS OF THE LAW

The law has been unable to accommodate the nature of the stripping industry in order to provide legal protection to the industry's workers. This is not intentional but implicit discrimination, stemming from historical perceptions of who the legal system is meant to protect.

155 Oliver and others, above n 3, at 104.

156 Community Law "Overview of sex work and the law" <https://communitylaw.org.nz>.

157 See Prostitution Reform Act, s 3.

158 Immigration New Zealand "Definition of Commercial Sexual Services under instruction E7.40" (11 March 2016) <www.immigration.govt.nz>. Immigration New Zealand explained that: "Commentary from the Justice and Electoral Committee on the Prostitution Reform Bill states that the definition of commercial sexual services would exclude activities such as stripping but may include activities such as lap dancing, nude massage or other activities involving physical participation of sexual acts with another person."

159 *Hamilton-Redmond v Casino Bar Ltd*, above n 1, at [23].

A The Law's Function as a Tool of Power

The legal system is a mode of power. It is a tool through which power can be produced and, therefore, constructs reality.[160] According to Michel Foucault, social interaction produces social norms which then construct how we are expected to behave.[161] We adhere to those expectations and therefore reinforce that power exerted over us. We create systems of power, but we also subject ourselves to that power.[162]

As a result, the law has no inherent meaning. The direction and application of the law are decided by those in power who wield it. The authority of the law is determined by the people who choose to accept it. This acceptance is conditional on the use of the rule of law's presumption of neutrality and equal treatment for every individual. The law emphasises the application of objectivity as a standard which uses reason to establish this neutrality. This use of objectivity and neutrality thus justifies its legitimacy in application to society.

However, Catharine MacKinnon explains what is perceived as objectivity in the law is actually the male point of view.[163] Historically, the law was developed by men for a society dominated by men.[164] The male point of view was everywhere and was the only consideration regarding creating law and applying it to society. Therefore, what was seen as the "neutral" and "objective" point of view was the male perspective constructed as the truth.[165] Applied to society, this point of view is what has been passed down as legal precedent and has shaped law today. This defines reality, constructing the social norms around the regulation of conduct and treatment.[166]

MacKinnon's theory demonstrates that there is a structural, implicit male bias embedded within the law. Due to the law historically being a male point of view, consideration of a woman's point of view or her perception of reality

160 Foucault *The History of Sexuality,* above n 2, at 93; Foucault *Discipline and Punish*, above n 2, at 194; and MacKinnon, above n 2, at 230.

161 Foucault *The History of Sexuality,* above n 2, at 93; and Foucault *Discipline and Punish*, above n 2, at 194, as cited in Amy Allen "Feminist Perspectives on Power" (28 October 2021) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu> at [3.5].

162 Michel Foucault "Two Lectures" in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Harvester Press, Brighton, 1980) at 98, as cited in Allen, above n 161.

163 MacKinnon, above n 2, at 162.

164 At 238.

165 Simone de Beauvoir *The Second Sex* (Penguin Books, London, 1949), as cited in Mackinnon, above n 2, at 121.

166 Mackinnon, above n 2, at 114.

is not applicable. This is because it was never a consideration to begin with. When applied to spheres where a difference in perspective matters, such as the sex industry, where men are seeking sexual gratification and women are capitalising on performing patriarchal gender norms to earn money, a lack of perspective reduces women to sexual objects. This then has implications for how the law views their rights in the workplace.

For example, the ERA referenced women being "products" and "selling themselves", as well as stating that the controlling of conduct by Calendar Girls was for the dancers' benefit because it would make them more appealing to men. This paternalistic and patronising approach indicates that the starting point in this ERA determination was the societal, masculine perception that women's role at the strip club is to provide sexual pleasure to men. In reality, women are there to make money because it is their job. The legal tests of control and integration should have been assessed from the viewpoint of whether management control hinders the ability to generate income rather than whether management control enhances dancers' sex appeal.

Historically, the law governed the public sphere, leaving the private sphere unregulated. This was because the private sphere was seen as a sphere of man's personal freedom.[167] However, this was also the sphere where women were collectively oppressed.[168] Due to heterosexual social norms, sex and the sex industry have traditionally been relegated to the private sphere. The assignment of work traditionally associated with service and with women to the private sphere implies this work is not considered real work. Men feel entitled to the provided services. For this reason, the Employment Court was able to broadly interpret employment factors to Uber drivers, but the ERA was not able to apply the same employment factors to dancers. One was within the realm of law in the public sphere and one was not. In support of this, MacKinnon states that:[169]

> Women need positive laws to guarantee their rights and entitlements because negative law creates a space in which it is unregulated. And if it has always been there, negative law leaves it unregulated.

The passing of the PRA to address the exploitation of sex workers exemplifies the need to codify negative law. Before the PRA, individuals working in the

167 At 168.
168 At 168.
169 At 164–165.

sex industry had no legal rights as the industry was unregulated.[170] This left them vulnerable to exploitation.[171] Management used exploitative and coercive practices reminiscent of strip club management such as fining systems or exposing workers to violent clients.[172]

Since the passing of the PRA, social stigma has remained but sex workers now have recourse to legal rights.[173] Sex workers in brothels face a reduced risk of harm and have reported an improvement in the application of employment rights, such as the reduction of unlawful fining systems, long hours and unlawful bonds.[174] An example of this is seen in *DML v Montgomery*, in which a sex worker took a brothel owner to the Human Rights Tribunal after he continually subjected her to sexual harassment in the workplace.[175] The brothel was found to be her "employer" under the Human Rights Act 1993 and she was awarded damages for humiliation, loss of dignity and injury to feelings caused by the sexual harassment.[176]

B Essentialism in the Law

Positive law is necessary for positive change due to the law's conflict with intersectionality. Law fragments individuals into one thing at a time, which leads to binary divides and essentialism. Because being a man was assumed to be the status quo, a woman can be a worker or a woman under the law but not both.[177] This contradicts a woman's reality[178] and leads to legal judgments that benefit one sector at the expense of the other. For example, the determination in *Hamilton-Redmond* reinforces independent contractors' distinction from employees by asserting their independence as well as benefitting business

170 Catherine Healy, Calum Bennachie and Anna Reed "History of the New Zealand Prostitutes' Collective" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 45 at 46.

171 Abel and others "The Prostitution Reform Act", above n 152, at 76.

172 Gillian Abel and Lisa Fitzgerald "Risk and risk management in sex work post-Prostitution Reform Act: a public health perspective" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 217 at 222, 225 and 226.

173 Gillian Abel and Lisa Fitzgerald "Decriminalisation and stigma" in Gillian Abel and others (eds) *Taking the Crime out of Sex Work* (The Policy Press, Bristol, 2010) 239 at 241.

174 Abel and Fitzgerald, above n 172, at 226.

175 *DML v Montgomery* [2014] NZHRRT 6.

176 At [122] and [146]–[148].

177 See Trina Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 Berkeley Women's LJ 16 at 17.

178 At 17.

owners. However, benefits to these sectors have come at the expense of female dependent contractors' employment rights.[179]

Fragmented legal selves force individuals to compartmentalise themselves. This is exemplified in the case studies where employment law is binary — you are an employee or an independent contractor, and there is nothing in between. This fails to take account of the spectrum of relationships in employment law and results in a lack of access to basic rights.

Essentialism in the law is further seen in the way the law frames those who work in sexualised environments as a homogenous group. Essentialising dancers in strip clubs and the wider sex industry blinds the law to reality. Binary assumptions of forced sexual abuse or free forms of work "miss the complexity of an activity that can act as *both* a form of 'work *and* exploitation'".[180] There are various reasons why people choose to work in strip clubs or the sex industry, such as the flexible working hours, the potential for increased income or because they enjoy the nature of the work. As one worker stated, "I am an escort and I am educated and I am a businesswoman and I am a professional".[181]

C Would a Revised Application of the Existing Legal Tests Work?

Hamilton-Redmond has established precedent demonstrating current employment law tests are inadequate to address the highly sexualised nature of the dancers' work. It ignores the reality of being independent *and* unprotected in a predatory, unregulated industry.

This can be contrasted with the recent Employment Court decision in *Pilgrim v Attorney-General*.[182] Six female plaintiffs who were former residents of Gloriavale were determined to have been employees during their time working in the community.[183] The women's work consisted of cooking, cleaning, washing and food preparation, beginning from around the age of six.[184] The work was "unrelenting, grinding, hard, and physically and psychologically demanding".[185]

In accordance with the legal tests in *Bryson,* the Court determined that the degree of control exerted over the women by the Gloriavale leadership

179 See *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [132].
180 Scoular, above n 30, at 11.
181 Abel and Fitzgerald "Decriminalisation and stigma", above n 173, at 241.
182 *Pilgrim v Attorney-General* [2023] NZEmpC 105.
183 At [163].
184 At [13]–[14].
185 At [18].

demonstrated that the real nature of the relationship was one of employment. This was due to the essential nature of the work to the community's operation and the expectation of the leadership that the women would work long hours in exchange for remaining in the community. Furthermore, it was understood that the plaintiffs would have been expected to be paid for that type of work if done outside of the community.[186] The Court's assertion that there is no distinction between what was historically "women's work" and what is seen as work in the eyes of the law is commendable, ensuring that economic value is ascribed to all.[187] This is an example of the application of the existing legal tests redefining whose perspectives matter.

Like the six plaintiffs in *Pilgrim*, dancers could seek a ruling from the Employment Court about their employment status. At the time of the determination in *Hamilton-Redmond,* the media did indicate the plaintiffs intended to appeal the ruling to the Employment Court, but it is unclear whether they did so within the prescribed 28-day time period.[188] However, unlike what the plaintiffs sought in *E Tū Inc* and *Pilgrim*,[189] dancers have stated they do not want their independent contractor status to change to that of an employee.[190] They are seeking a nationwide overhaul of the current system rather than continuing working (but shifting status) within it. *Hamilton-Redmond* demonstrates that the issue is not that dancers are mislabelled, but that the current employment categories do not accurately encompass their work and their reality, regardless of which is selected, and are therefore not fit for purpose. The vulnerability of women who work in strip clubs is not due to their gender, the sexualised nature of their work or their perceived victimisation. It is due to the binary construction of employment law which leaves dancers exposed to exploitation with no recourse to legal protections, which may have been available had they worked in a different environment. Therefore, another claim to the Court is likely not in the dancers' interests.

D The Need for Legislative Intervention

In *Hamilton-Redmond*, the ERA stated that any regulation of the adult

186 At [134], [140] and [163].

187 At [58].

188 Employment Relations Act, s 179.

189 See *E Tū Inc v Rasier,* above n 55, at [1]; and *Pilgrim v Attorney-General*, above n 182, at [26].

190 See "Petition of Fired Up Stilettos: Strippers' Rights are Workers' Rights" (16 March 2023) New Zealand Parliament <https://petitions.parliament.nz>; and Hall, above n 39, at 27:20.

entertainment industry must come from the legislature.[191] The difficulty of applying the established legal tests to dancers supports this. However, any positive law change must encompass a broader conception of the law's role and responsibility toward protecting dancers' rights to avoid reflecting and enforcing stigmatised, one-dimensional social norms.[192] Applying Foucault's theory of power, legal considerations when choosing which perceptions matter must change because "the law will most reinforce existing distributions of power when it most closely adheres to its own ideal of fairness".[193]

A redistribution of legal considerations was demonstrated in Canada where in *Bedford v Canada (Attorney-General)* the Supreme Court struck down legislation that criminalised conduct surrounding prostitution such as brothels and receiving money from sex work.[194] The Court's reasoning was that this increased the risk of violence for sex workers to an unacceptable degree stating "[t]he violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence".[195]

Bedford did not "make a pronouncement on prostitution as being good or bad" but recognised sex workers had rights as citizens.[196] By taking account of their subjective experience of safety (or lack thereof), the Court functioned as a legal instrument that supported the sex worker's reconstruction of norms and protected people usually excluded from society.[197] This was echoed by the New Zealand Parliament in passing the PRA for sex workers and can be done again to protect dancers in strip clubs.

VIII POTENTIAL REFORM

In February 2023, 19 dancers at Calendar Girls, Wellington were fired from their jobs via a Facebook post.[198] At the beginning of 2023, the dancers were presented with a new contract by club management, which increased the prices of their services to clients but lowered the dancers' cut on some private bookings.[199] The dancers' cut of performing a standard dance went from 60

191 *Hamilton-Redmond v Casino Bar Ltd,* above n 1, at [125].
192 Mackinnon, above n 2, at 163.
193 At 163.
194 *Bedford v Canada (Attorney-General)* [2013] 3 SCR 1101.
195 At [89].
196 Scoular, above n 30, at 140.
197 At 148.
198 Hall, above n 39; and King, above n 29.
199 Hall, above n 39, at 8:12.

percent to 50 percent.[200] In response, 37 dancers wrote a letter to management asking for their cuts not to be lowered.[201] Management's response was a mass dismissal.

However, the 19 "Fired Up Stilettos" did not go quietly. The dancers gathered support through public protest and online activism,[202] culminating in a presentation of a petition to Parliament.[203] The petition asks for Parliamentary recognition of the right of workers to collectively bargain as independent contractors, to ban fines and bonds between employers and contractors, as well as limit the cut an employer can take from a contractor's profits to 20 percent nationwide.

There are three potential avenues that Parliament could utilise for reform which this article will explore: inclusion of dancers in the definition of the PRA, establishing "dependent contractor" as a legal employment status and granting independent contractors the right to collectively bargain.

A Inclusion in the Prostitution Reform Act 2003

One of the purposes of the PRA is to protect sex workers from exploitation.[204] If dancers were considered sex workers, it would impose regulations on the strip club industry. Section 16 of the PRA outlaws any inducement or compelling of an individual to provide commercial sexual services. The fining systems used by clubs would be considered improper use of management power to induce dancers to provide sexual services due to the financial detriment the dancers face if they refuse. Their refusal to provide sexual services would be reinforced by s 17 of the PRA. This would clarify that any sexual harassment in the course of dancers' work, by clients or others, would be a violation of law and not attributable to their profession.

However, as there is a practical distinction between dancers and sex workers, dancers may not want to be considered under the umbrella of a sex worker. In addition, the expansion of commercial sexual services would broaden the meaning of sexual service to more than a physical act. Although this would then encompass occupations such as phone sex services and

200 At 8:23.
201 At 8:31.
202 See "Fired Up Stilettos" Beacons <https://beacons.ai/firedupstilettos>.
203 "Petition of Fired Up Stilettos", above n 190.
204 Prostitution Reform Act, s 3(a).

developing online sex industries such as OnlyFans, it may run contrary to society's current perception of what sex includes.

B Recognising "Dependent Contractor" as an Employment Status

Alternatively, Parliament could expand the legal employment categories to include "dependent contractor". Rights for dependent contractors could include the ability to bring a personal grievance surrounding their work to a legal authority, the right to unionise and recognition of financial dependence on one source, despite having the freedom to choose one's hours. This would acknowledge dancers' degree of control, distinguishing them from employees, without sacrificing necessary legal protections. It would also clarify industry practices, such as whether requesting leave from clubs is necessary if dancers are considered independent contractors. This would regulate the power imbalance between management and dancers in the strip club industry. However, this would also have implications for many other types of work which would fall under this category.

Employment law reform would follow the example of the United Kingdom which has a third employment status of "worker", which recognises the element of dependency in some contractual relationships.[205] This status covers those working under a contract of service and guarantees certain employment rights such as protection against unlawful deductions from wages, receipt of the minimum wage and paid holiday breaks.[206] However, workers are not protected against unfair dismissal,[207] which is exemplified by case studies referred to in this article where unfair dismissal is a major cause of complaints.

The New Zealand Government has recognised that protections reliant on employment status are an issue. A Working Group for Contractors published a 2021 report recommending legislative amendments.[208] Amongst other recommendations for clarification, the report recommended "revis[ing] the legislative definition of 'employee' to include a strong sense of contradistinction to someone who is genuinely in business on his or her own account".[209] This would appear to focus on economic dependency and reliance.

205 Thompson, above n 24, at 24 and 26.

206 At 24.

207 At 24.

208 Ministry of Business, Innovation & Employment *Tripartite Working Group on Better Protections for Contractors: Report to the Minister for Workplace Relations and Safety* (22 December 2021).

209 At 14.

However, there exist concerns around legislative reform in this area, including whether the establishment of dependent worker status would erode established employment rights. Some employees may be shifted to the new category which could reduce their rights.[210] Furthermore, the complex nature of employment relationships could mean reform only results in more blurred lines. Uncertainty as to what distinguishes an employee from a dependent contractor, and a dependent contractor from an independent contractor, could result in parties to contracts "altering their situations" to fit into whichever category benefits them most.[211] This could lead to additional exploitation. Any reform would have to address these ambiguities as well as ensure workers such as dancers do not continue to fall through the gaps.

Reference in the report to more "objective" legislative tests is reminiscent of the dominant legal perspective being the only one taken into account.[212] It is unlikely that the Government is reaching out to strip club workers in their public consultations, in comparison to the more well-known dependent contractors such as Uber drivers. Contractors mentioned in the report were associated with the public sphere and male-dominated industries such as construction and courier drivers.[213] Without consultation and inclusion, the Government risks reflecting social norms regarding what work is entitled to protection and therefore which work is valued within any new law. There would likely be no alteration to the regulatory enforcement in the strip club industry, and the law would remain complicit in dancers' exploitation due to its embedded, structural biases.

C Collective Bargaining of Independent Contractors

Regardless of the chosen avenue for reform, this article has demonstrated that reform efforts must understand and take into account the subjective realities of those who dance in strip clubs. This cannot be done without the ability of dancers to collectively represent themselves and contribute their voices to reform efforts. Therefore, an amendment to employment rights surrounding collective action appears to be most urgent.

Currently, independent contractors cannot engage in collective action.

210 Ministry of Business, Innovation & Employment *Better protections for contractors: Summary of public consultation* (June 2020) at 46, as cited in Thompson, above n 24, at 21.

211 Thompson, above n 24, at 22.

212 See Ministry of Business, Innovation & Employment, above n 208, at 3 and 17.

213 At 5–6.

The law assumes independent contractors and their principals have equal bargaining power in negotiating the terms of a contract.[214] As this article has demonstrated, the assumption of equal bargaining power does not take into account structurally embedded power imbalances and gendered and sexualised evaluations of the worth of work. Nevertheless, generally, independent contractors cannot bargain collectively, as this is considered anti-competitive behaviour prohibited by the Commerce Act 1986.[215]

In 2022, the Government passed the Fair Pay Agreements Act 2022, which established a framework for collective bargaining to set minimum standards across an entire occupation or industry.[216] However, the Ministry of Business, Innovation & Employment (MBIE) advised that Government contractors should not be included in the scheme at this stage.[217] MBIE also announced that further work responding to recommendations stemming from the Working Group's 2021 report had been "put on hold" pending the outcome of Uber's appeal of the *E Tū Inc* decision.[218] It said the Employment Court's ruling in that case has "significant implications on the legal definition of a contractor".[219] The significance of the ruling is already evident. Since the *E Tū Inc* decision, hundreds of drivers have allegedly unionised to strengthen their position ahead of collectively bargaining for better pay and conditions with the company.[220]

For dancers however, the ability to collectively bargain as independent contractors remains impossible. With further work on contractors' rights delayed by the reliance on the outcome of the *E Tū Inc* appeal, it is unlikely the dancers' demands in their petition to Parliament will be granted anytime soon.

214 Hill, above n 59, at 146.

215 Ministry of Business, Innovation & Employment *Briefing: Advice on contractors in the Fair Pay Agreements system* (4 December 2020) at [2]; and Thompson, above n 24, at 41.

216 Ministry of Business, Innovation & Employment *The Fair Pay Agreements System: A guide for participants* (1 December 2022) at 6. However, this Act was repealed with effect from 20 December 2023.

217 Ministry of Business, Innovation & Employment, above n 216, at 4–6.

218 Ministry of Business, Innovation & Employment "Contractor work in Aotearoa New Zealand" (29 March 2023) <www.mbie.govt.nz>. In June 2023, the Court of Appeal granted Uber leave to appeal the judgment of the Employment Court: see *Rasier Operations BV v E Tū Inc* [2023] NZCA 216. The application was granted in relation to three questions of law, including whether the Employment Court misdirected itself on the application of s 6 (the meaning of "employee") of the Employment Relations Act and whether the Employment Court misapplied the test in s 6.

219 Ministry of Business, Innovation & Employment, above n 218.

220 Esther Taunton "Uber drivers to begin collective bargaining after landmark court ruling" *Stuff* (online ed, Wellington, 13 February 2023).

IX CONCLUSION

This article has outlined that although dancers are being exploited by club management, the law is complicit due to its failure to provide legal protections for dancers in the industry. This is a reaction to the gendered and sexualised nature of their work which stems from embedded male bias within the law regarding what is considered work and which work is valued. The result is that the established legal tests are unable to accommodate the workplace realities of dancers in strip clubs and dancers are unable to fit into any established, binary category of legal protection.

Meanwhile, the industry-wide practices of fining, firing and abusing dancers have demonstrated clubs will continue to ignore dancers' collective and individual efforts for better pay and working conditions. Inclusive reform is needed for the law to regulate the strip club industry and reconstruct stigmatised and masculine social norms. Dancers in strip clubs deserve legal protections that recognise their autonomy, sexualised reality and entitlement to a safe workplace.

As Parliamentary reform is currently delayed, further research should be encouraged in the meantime. This article has highlighted that there is minimal, if not non-existent, research regarding strip club exploitation in New Zealand. To be truly inclusive of dancers' subjective realities, there needs to be enquiries into how exploitation is experienced differently by intersecting identities within the strip club dancers' community. Representative research is instrumental in ensuring that any future reform does not revert to those same essentialist views or reinforce structural biases regarding the value of gendered or sexualised work. Blurred lines between the independence of workers and the exploitation of workers have given rise to the law's complicit participation in the erosion of some workers' rights. It is only when the much-needed reforms are designed to include all forms of work that the legal framework regarding the protection of workers can be considered fair.

AN INTERSECTIONAL RACE AND GENDER ANALYSIS: AN AOTEAROA NEW ZEALAND LENS ON ANTI-DISCRIMINATION LAW

Amaani Batra*

Despite an ever-diversifying population in Aotearoa New Zealand, anti-discrimination law lacks explicit provisions for intersectional discrimination claims. Notably, indigenous women and women from ethnic minorities bear the brunt of such lacking legislation. This article explores the profound impact of intersectionality on the employment experiences of these women and scrutinises the shortcomings of the current legal approach. The article advocates for a paradigm shift in our legal framework. It proposes a departure from the conventional comparator model, instead supporting a multiple-ground approach. The suggested amendments to existing legislation are complemented by a call for widespread industry training and enhanced reporting obligations. This approach is crucial for fostering transformative change to acknowledge and effectively address the unique challenges faced by individuals with intersecting identity grounds in Aotearoa New Zealand. Failure to embrace such measures risks undermining the multi-faceted nature of our lived experiences.

I INTRODUCTION

With the growing diversity of the population within Aotearoa New Zealand, discrimination claims are gaining complexity and encompassing multiple grounds. Between October 2015 and October 2016, complaints lodged with the Human Rights Commission (HRC) citing more than one ground rose to 15.4 percent, compared to 9.19 percent of all complaints recorded between October 2011 and October 2012.[1] Most of these claims pertained to the

* Recent LLB(Hons)/BCom graduate from the University of Auckland and 2024 Law Clerk at Russell McVeagh. The author extends her gratitude to Professor Julia Tolmie for inspiring this article, and to her family and friends for their love and support.

1 Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Super Diversity Centre, 2017) at [10]. Note that most of these claims pertained to the combination of age, race and gender. The Human Rights Commission has not made these statistics publicly available in their Annual Reports.

combination of age, race and gender, warranting focused attention on the distinct disadvantages women of colour often face across various contexts ,compared to Pākehā women.[2] The convergence of identity categories, such as race and gender, form an intersectional identity susceptible to marginalisation in both dimensions.[3]

While the Aotearoa New Zealand legal framework does not explicitly preclude intersectional discrimination claims,[4] its underdeveloped state emphasises the pressing need for reform to address the socio-economic inequalities experienced by women of colour in particular. The judicial inclination to subtract race or gender from an intersectional claim inadvertently elevates the white experience, essentialising an individual's experience of discrimination despite a myriad of overlapping factors that may be applicable.[5] A wealth of research highlights the "double" disadvantage that women from ethnic minorities often encounter in various circumstances, such as employment, health and criminal justice.[6]

This article employs an intersectional approach to critically analyse Aotearoa New Zealand's anti-discrimination law, focusing on race and gender in an employment context. Part II outlines what intersectionality is and its impact on women of colour. Part III discusses Aotearoa New Zealand legislation that lacks explicit affirmation of intersectional discrimination claims. Part IV explores recommendations, including adopting a multiple-ground approach and Part V discusses the necessity for supplementary measures to assist litigation.

II INTERSECTIONALITY AND ITS IMPACT

A Intersectionality

The term "intersectionality" gained prominence in 1989 through the work

2 At [11]. For example, in 2022 the Aotearoa New Zealand gender pay gap was 9.2 percent. Yet this gap is wider for Māori, Pacific and ethnic women compared to Pākehā women. See Public Service Commission "pay gaps and pay equity" <www.publicservice.govt.nz>.

3 Kimberlé Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43 SLR 1241 at 1244.

4 Amanda Reilly "Māori Women, Discrimination and Paid Work: The Need for an Intersectional Approach" (2019) 50 VUWLR 321 at 328.

5 Patricia Hill Collins and Valerie Chepp "Intersectionality" in Georgina Waylen and others (eds) *The Oxford Handbook of Gender and Politics* (Oxford University Press, Oxford, 2013) 57 at 59.

6 Chen, above n 1, at [4].

of Kimberlé Williams Crenshaw, an African-American law professor.[7] Crenshaw astutely argued that "dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis".[8] She drew attention to a pivotal case, *DeGraffenreid v General Motors*, in which a Black woman claimed that her employer's "last hired-first fired" policy perpetuated discrimination on the interweaving grounds of race and gender.[9] Nevertheless, the claim was dismissed.[10] This case illustrated how a Black woman faces intersecting disadvantages exacerbated by being Black and female. Crenshaw highlights that the plaintiff had no framework to comprehend the complex social problems impacting Black women, resulting in ethnic women being left in virtual isolation.[11] Subsequent commentary has described how an individual's lived experiences are intricately shaped by intersecting power systems conferring dominance on different spheres of identity.[12]

Intersectional discrimination is broadly described as discrimination experienced by the impacted individual through a multitude of factors which cannot be separated into its component parts.[13] Instead, multiple differing characteristics produce discrimination that is unique and differentiated from a singular form of discrimination.[14] Legal processes often grapple with the challenge of understanding the lived experiences of those situated at the centre of multiple identity grounds.[15] Moreover, the unique ethnic identities represented by wāhine Māori exemplify distinct types of discrimination, but prerogatives too. However, the current classification of these intersecting

7 Grace Ajele and Jena McGill *Intersectionality in Law and Legal Contexts* (LEAF, Canada, 2020) at 4. See Kimberlé Crenshaw "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chi Legal F 139.

8 Crenshaw, above n 7, at 140.

9 *DeGraffenreid v General Motors Assembly Division* 413 F Supp 142 (ED Mo 1976) at 143.

10 At 145. See also Crenshaw, above n 7, at 141.

11 Kimberlé Crenshaw "The Urgency of Intersectionality" (TED Conference, California, 2016).

12 Patricia Hill Collins and Valerie Chepp "Intersectionality" in Georgia Waylen and others (eds) *The Oxford Handbook of Gender and Politics* (Oxford University Press, Oxford, 2013) 57 at 59; and Ben Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 ERR 73 at 75.

13 Sophie Sievert-Kloster "Intersectional Discrimination in European Union Law: Towards Redressing Complex Forms of Inequality?" in Simon Fink and Lars Klein (eds) *Inequality and Solidarity: Selected Papers Presented at the Euroculture Intensive Programme 2019* (University of Groningen, 2020) at 33.

14 Mary Eaton "Patently Confused: Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev Const Stud 203 at 229.

15 Elena Marchetti "Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It" (2008) 17 Soc Leg Stud 155 at 170; and Crenshaw, above n 3, at 95.

spheres underscores stereotypical rhetoric of marginalised homogenous groups, which disempowers the multi-faceted nature of ethnic women's identities.[16] Aotearoa New Zealand, as a contemporary and ever-diversifying community, must consciously embrace intersectionality and inclusivity in the law while international discrimination discourse advances.

B The Impact of Intersectionality on Women of Colour

The Western feminist approach falls short in acknowledging the unique experiences of indigenous women and women who are from ethnic minorities. By positioning white feminism as feminism for all women, the Western model denies the struggles of women of colour.[17] More generally, the HRC data for Aotearoa New Zealand demonstrates that women are more likely to encounter employment-related discrimination than men. Meanwhile, men are disproportionately favoured with higher pay as compared to women and ethnic minority groups.[18] Compared to white women, women from ethnic minorities are more likely to bear the weight of childcare responsibilities, contend with the effects of poverty and struggle to secure high skilled roles.[19] When considering the hardships faced by women and people of colour respectively, subconscious bias and overt acts of discrimination operate to perpetuate a dual disadvantage for indigenous women and women from ethnic minorities.

Notably, wāhine Māori endure systemic disadvantages stemming from the continuing impact of colonisation.[20] White privilege, the societal privilege that benefits white people over people of colour, hinders the possibility of wāhine Māori sharing an affinity with Pākehā women who do not acknowledge or prioritise the imperative to disestablish the lingering consequences of colonisation.[21] Instead, colonisation has exemplified systemic biases embedded within Aotearoa New Zealand's societal structures, perpetuating distorted

16 Rachel Simon-Kumar "Affirming Fissures: Conceptualizing Intersectional 'Ethnic' Feminism in Aotearoa New Zealand" (2023) 44 J Women Polit Policy 454 at 454–455.

17 Leonie Pihama "Mana Wahine Theory: Creating Space for Māori Women's Theories" in *Mana Wahine Reader: A Collection of Writings 1999 – 2019* (Volume II, Te Kotahi Research Institute, Hamilton, 2019) 60 at 64.

18 Reilly, above n 4, at 325.

19 Crenshaw, above n 3, at 1245.

20 Clea Te Kawehau Hoskins "In the Interests of Maori Women? Discourses of Reclamation" (1997) 13 Women's Studies Journal 25 at 31 and 38.

21 Leah Whiu "A Māori Woman's Experiences of Feminist Legal Education in Aotearoa" (1994) 2 Wai L Review 161 at 164; and Jean Halley, Amy Eshleman and Ramya Mahadevan Vijaya *Seeing White: An Introduction to White Privilege and Race* (Rowman & Littlefield Publishers, Maryland, 2011) at 16.

access to healthcare, violence and education, among others. The double disadvantage experienced today through intergenerational deprivation is evident: for example, 34.2 percent of wāhine Māori aged between 20 and 24 are not engaged in education, employment or training.[22] Additionally, Pākehā women tend to secure higher skilled, higher paying roles than their wāhine Māori counterparts.[23] By acknowledging the wholeness and plurality of women's experiences, we can forge allegiances across these differences instead of essentialising the traits of womanhood. Addressing intersectional discrimination recognises the extent of adverse treatment suffered by women of colour and helpfully re-conceptualises the definition of discrimination.[24]

Nevertheless, we slowly move towards the emergence and rise of tangata tiriti, non-Māori allies who seek to nurture meaningful relationships with tangata whenua.[25] In light of Te Tiriti o Waitangi, Aotearoa New Zealand should embrace these relationships, offering tangata tiriti the opportunity to unlearn their colonial Pākehā identity and actively engage with the community for positive change by way of recognising the intersectionality of wāhine Māori identities.[26] Inclusive decision making ensures tailored policies and initiatives that recognise the diversity of voices in Aotearoa New Zealand, resulting in progressive intersectional solutions. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) implores state parties, including Aotearoa New Zealand, to contemplate the intersectional discrimination experienced by indigenous females, considering factors such as gender, sex, indigenous identity and ethnicity.[27] An intersectional approach would be further enriched by the collaboration of tangata whenua and tangata tiriti in advocating against discriminatory subordination, recognising

22 Human Rights Commission "Tracking Inequality at Work" (2017) <tracking-equality.hrc.co.nz>. Note that this is a "Not in Education, Employment or Training" (NEET) rate.

23 Mike Hensen and John Yeabsley *Changes in women's earnings: Key changes over the last 30 years and comments on the outlook for the next 10 years* (Ministry of Women's Affairs, January 2013) at 22; and Ministry for Women "The gender pay gap" <www.women.govt.nz>.

24 Sarah Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) 23 OJLS 65 at 69.

25 Treaty People "About Tangata Tiriti" <www.treatypeople.org>.

26 Te Kuru o te Marama Dewes "What does it mean to be tangata Tiriti?" *The Spinoff* (online ed, 6 February 2022).

27 United Nations Committee on the Elimination of Discrimination against Women *General Recommendation No 39 (2022) on the rights of Indigenous women and girls* UN Doc CEDAW/C/GC/39 (316 October 2022) at [3].

a broader range of intersectional identities and diminishing the impacts of white feminism.

C Intersectionality Critiqued

Despite the plethora of legal scholarship regarding intersectionality, transformational change remains disappointingly minimal. At times, intersectionality has been critiqued as a depoliticised catchphrase, seemingly more focused on delineating points of divergence than instigating meaningful shifts.[28] Some scholars fear that intersectional feminism, in its endeavour to distinguish itself from white liberal feminism, often falls short of instigating systemic changes that fully embrace intersectionality.[29] The term has been coined as little more "than a tool of diversity management and mantra of liberal multiculturalism".[30] However, Crenshaw's insight reminds us that the word "intersectionality" serves as an imperfect and contingent tool, merely offering a starting point to reevaluate ideal frameworks for comprehending power, oppression, and identity categories.[31]

Another critique of intersectionality highlights its emphasis on identity categories. The focus on relations between identity categories arguably ignores the heterogeneity of experiences within individual categories.[32] While scholars like Trina Grillo regard intersectionality as a means to challenge prevailing narratives that reinforce racism and systemic oppression, critics argue that intersectionality inadvertently entrenches identity categories and their inherent distinctions.[33] The division of women by racism, class, sexism and other prejudices calls for a serious confrontation of the barriers among women to dismantling separate systems of subordination.[34] Intersectionality works towards abolishing the essentialist outlook that all women speak with a single voice. As such, there is clear merit in adopting an intersectional approach to

28 Vivian M May *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge, New York, 2015) at 8.

29 Shreya Atrey *Intersectional Discrimination* (Oxford University Press, Oxford, 2019) at 34; and Jennifer C Nash "Re-thinking intersectionality" (2008) 89 Fem Rev 1 at 9.

30 Jasbir K Puar *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, Durham, 2007) at 212.

31 Crenshaw, above n 3, at 1244.

32 Ido Hadas Katri "In-Between Categories of Law: a Gender Variant Analysis of Anti-Discrimination Law and Litigation" (LLM thesis, University of Toronto, 2015) at 44.

33 Trina Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 BGLJ 16 at 16; and Leslie McCall "The Complexity of Intersectionality" (2005) 30 Journal of Women in Culture and Society 1771 at 1773.

34 bell hooks *Feminist theory: from margin to center* (Routledge, New York, 2015) at 44.

discrimination law, providing future claimants a platform to seek justice for their experiences.

III THE LAW IN AOTEAROA NEW ZEALAND

Currently, no anti-discriminatory legislation in Aotearoa New Zealand explicitly prohibits intersectional discrimination claims. These legal provisions neither mandate that discrimination claims are based on a single prohibited ground nor require each prohibited ground to be individually considered.[35] Despite this ambiguous legislation, most HRC multi-ground complaints or personal grievances filed in the Employment Relations Authority are often resolved through mediation or early resolution, vitiating the need for court intervention.[36] While the HRC has addressed multiple ground discrimination, the courts, the Employment Relations Authority and the Human Rights Review Tribunal (HRRT) are yet to directly address intersectional discrimination,[37] primarily because a claimant has not expressly pleaded the issue.[38] Nevertheless, women from ethnic minorities continue to face employment discrimination through unjust termination, being disregarded in respect of promotions, recruitment selection and regarding access to opportunities. Despite possessing satisfactory, or even superior skills compared to their male counterparts, women from ethnic minorities contend with systemic barriers that impede their professional advancement, perpetuating discriminatory practices in the workplace.[39]

A The Legislation

The Human Rights Act 1993 (HRA) and the New Zealand Bill of Rights Act 1990 (NZBORA) work in conjunction to legally protect the nation. Section 19(1) of the NZBORA states that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA.[40] Section 21 of

35 Chen, above n 1, at [64].

36 Reilly, above n 4, at 333.

37 The author was not able to locate any decision of a New Zealand court or tribunal directly addressing intersectional discrimination using online databases.

38 Chen, above n 1, at [64]. Multiple-ground discrimination refers to a claim of discrimination made on more than one ground, with each ground being considered separately. See *Rupa v Th89 Ltd* [2018] NZERA Auckland 277; and *Wang v New World Market Ltd* [2016] NZERA Auckland 124. These cases address multiple prohibited grounds of discrimination, yet the decision maker did not directly address intersectional discrimination.

39 Reilly, above n 4, at 329; and Statistics New Zealand *Working together: Racial discrimination in New Zealand* (2012) at 6.

40 New Zealand Bill of Rights Act 1990, s 19(1).

the HRA outlines the prohibited grounds of discrimination, including but not limited to: sex; race; ethnic origins; employment status and disability.[41] Women from ethnic minorities who encounter employment-related discrimination may invoke s 22 of the HRA, which deems it unlawful for an employer to refuse employment, offer less favourable terms of employment, terminate or retire the employee, or infringe training and promotion opportunities based on a prohibited ground.[42] Alternatively, s 103(1)(c) of the Employment Relations Act 2000 allows an employee to bring a personal grievance against their employer due to discrimination. The claim relies upon the HRA prohibited grounds of discrimination, with similar claims to that of s 22 in the HRA.

Interestingly, on 3 August 2023 Hon Grant Robertson introduced the Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill, which purports to expand the HRA. According to the general policy statement of the Bill, the HRA does not "specifically protect against the intersectional discrimination experienced by trans, intersex or non-binary people".[43] The wording suggests that the HRA currently permits intersectional discrimination claims, albeit that the HRA makes no explicit mention of intersectionality or a multiple-ground approach.

Furthermore, article three of the English version of the Treaty of Waitangi effectively affirms principles of equality and, by extension, non-discrimination.[44] Article three of Te Tiriti o Waitangi bears a similar effect, safeguarding the rights of all ordinary people in Aotearoa New Zealand.[45] Neither version of the Treaty expressly details specific grounds of discrimination. Arguably, this may prevent claimants from advancing intersectional discrimination claims in the Waitangi Tribunal. The Waitangi Tribunal had the opportunity to consider such claims when commencing the Mana Wāhine Kaupapa Inquiry in December 2018, aimed at addressing unresolved claims alleging prejudice against wāhine Māori due to Crown-resulting Treaty breaches.[46] In July 2020, the presiding

41 Human Rights Act 1993, s 21.

42 Section 22.

43 Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill 2023 (275-1) (explanatory note) at 1.

44 Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 407.

45 Treaty of Waitangi 1840, art 3.

46 Waitangi Tribunal *Memorandum-Directions of the Chairperson Initiating the Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2.5.8, 2018) at 2.

officer affirmed that the Inquiry had scope for exploring the intersection of "race, gender, and class", which gives rise to "interconnected disadvantage and discrimination for wāhine Māori".[47] However, intersectionality failed to substantially influence the Tūāpapa hearings, the initial hearings of the inquiry that were designed to lay the groundwork for the broader inquiry.[48] As a result, it remains uncertain to what extent intersectionality will be incorporated into the inquiry, as the Waitangi Tribunal is now commissioning research.[49]

B The Comparator Approach

Traditionally, Aotearoa New Zealand case law reflects a comparator, single-axis approach, enunciating the Court's retreatment into an essentialist and compartmentalised understanding of discrimination.[50] The comparator test involves the claimant showcasing that a similarly positioned individual or group — lacking the alleged grounds of discrimination presented by the claimant — would experience a more favourable outcome under identical circumstances.[51] Rooted in the notions of equality prevailing in the 1980s, the comparator model epitomises historical notions of discrimination distinct from its modern-day expansion.[52] The Court of Appeal in *Quilter v Attorney General* held that the essence of discrimination was founded in treating people differently in comparable circumstances; thus, this "comparator" was pivotal in identifying discrimination.[53]

As put by Elias CJ and Blanchard J in *McAlister v Air New Zealand Ltd*, "the task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue".[54] This was expanded by Tipping J:[55]

> … the most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground.

47 Waitangi Tribunal *Appendix A: Confirmed scope for the inquiry* (Wai 2700, 2.5.24(a), 2020) at 1.
48 Waitangi Tribunal "Mana Wāhine Kaupapa Inquiry" <www.waitangitribunal.govt.nz>.
49 Ministry for Women "Ngā Kaupapa Rangahau | Research projects" <www.women.govt.nz>.
50 Hannett, above n 24, at 76.
51 Shreya Atrey "Comparison in intersectional discrimination" (2018) 38 LS 379 at 379.
52 Suzanne B Goldberg "Discrimination by comparison" (2011) 120 Yale LJ 728 at 731, 740 and 789.
53 *Quilter v Attorney General* [1998] 1 NZLR 523 (CA) at 573.
54 *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [34].
55 At [52].

Initially, *Quilter v Attorney-General* outlined the Aotearoa New Zealand approach to anti-discrimination law. However, it failed to provide a cohesive test with clear guidance.[56] Instead, the Court of Appeal in *Ministry of Health v Atkinson* established a broad three-stage test for discrimination:[57]

i) whether there is a differential treatment between persons or groups in comparable situations on the basis of a prohibited ground under s 19 of the NZBORA;
ii) whether differential treatment imposes a material disadvantage as per s 19 of the NZBORA; and
iii) whether the discrimination is demonstrably justifiable in a free and democratic society as per s 5 of the NZBORA.

In straightforward scenarios, the mirror comparator method allows for the comparison of a person with the exact characteristics of the claimant, except without the ground of prohibited discrimination, to unveil the alleged differential treatment.[58] For example, a female staff member may compare her prejudicial treatment to a male colleague holding the same job title within the firm. However, in complex scenarios, the comparator approach necessitates a separate claim for each distinct legal identity in light of its ostensible framework.[59] For instance, an Indian woman like the author could file a gender discrimination claim, making the comparator a man with alike qualifications and job title. Alternatively, a race-based claim would make the comparator an otherwise identical Pākehā individual. However, the mirror comparator fails to acknowledge the interactive nature of overlapping groups, neglecting nuanced experiences of discrimination.[60] Courts in overseas jurisdictions considering intersectional claims have employed either a series of mirror comparators for each prohibited ground or a single mirror comparator that did not precisely match the claimant's characteristics but was otherwise similarly situated.[61] Undoubtedly, both options disregard the necessity of an intersectional claim.

56 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [99].
57 At [55] and [109].
58 Asher Gabriel Emanuel "To Whom Will Ye Liken Me, and Make Me Equal?: Reformulating the Role of the Comparator in the Identification of Discrimination" (2014) 45 VUWLR 1 at 9.
59 Reilly, above n 4, at 331; and Atrey, above n 51, at 380.
60 *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396 at [58] and [59].
61 Atrey, above n 51, at 383.

"Treating like alike", in respect of comparators, can perpetuate inequalities and inherently disregard the patterns of disadvantage faced by women of colour. A single-axis framework preserves the profound impact on intersecting groups instead of appreciating and rectifying the interweaving relationships of disadvantage. The comparator model positions women from ethnic minorities in stark opposition with the "most privileged cognate group".[62] Fundamentally, the essentialist comparator-based mechanism overlooks that every individual embodies at least two social characteristics.[63] The progression of modern society gleans light upon the lacklustre comparator approach that purports to serve as a universal "one size fits all" solution for all discrimination claims.

IV A MULTIPLE-GROUND APPROACH

This article argues that Aotearoa New Zealand should adopt a contextualised perspective by endorsing an intersectional approach to discrimination. Although the Government claims to recognise the impacts of intersectional discrimination for women and girls in Aotearoa New Zealand, legislation fails to substantiate this otherwise legally baseless assertion.[64] Tipping J in *McAlister v Air New Zealand* and *Quilter v Attorney-General* affirmed that courts should take a "purposive and untechnical approach"[65] when identifying a breach under s 19(1) of the NZBORA:[66]

> The spirit of the Bill of Rights and the Human Rights Act suggests a broad and purposive approach to these problems… New Zealand's human rights legislation… is to be afforded a liberal and purposive interpretation, rather than an interpretation of a technical kind.

Consequently, s 19(1) of the NZBORA does not explicitly preclude a claimant from raising a discrimination claim on more than one prohibited ground. Further, courts have the jurisdiction to interpret s 19(1) as being expansive enough to encompass intersectional claims. Extensive law reform is not

62 At 381.
63 Hannett, above n 24, at 68.
64 New Zealand Government *United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Ninth Periodic Report by the Government of Aotearoa New Zealand* (July 2023) at 62.
65 *McAlister v Air New Zealand*, above n 54, at [51].
66 *Quilter*, above n 53, at 575 and 577.

required to comprehend the scope of s 19(1).[67] This is not the case for s 22(2) of the HRA, which states:[68]

> It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

The language of s 22(2) expressly requires the discriminated employee to be compared to a similar employee, inducing the need for a comparator. However, Mai Chen, a lawyer in Aotearoa New Zealand advocating for intersectional anti-discrimination law, suggests that clarifying the NZBORA and the HRA may benefit future claimants.[69] Firstly, Chen proposes that s 19(1) could be amended to explicitly state its inclusion of intersectional discrimination, aligning it with Canada.[70] Section 3.1 of the Canadian Human Rights Act 1985 was included in 1998 to confirm that discrimination practice included practice based on one or more prohibited grounds or due to a combination of prohibited grounds.[71] Such a clarification increases certainty and awareness to claimants, elucidating potential avenues for pursuing a discrimination claim.

The Supreme Court of Canada has yet to hear an intersectional discrimination claim, likely due to inconsistent discourse and analysis.[72] Nonetheless, the legislation allows intersectionality to gradually inject existing anti-discrimination law, primarily in Canadian human rights tribunals.[73] For instance, the Ontario Human Rights Tribunal in *Baylis-Flannery v DeWilde (No 2)* found that an intersectional analysis was necessary to assess whether a Black woman had experienced sexual harassment.[74] Building on the precedent set in previous tribunal cases, the Tribunal found an intersectional analysis "is a fact-driven exercise that assesses the disparate relevancy and impact of the possibility of compound discrimination".[75] The comparator approach

67 Chen, above n 1, at [91].
68 Human Rights Act 1993, s 22(2).
69 Chen, above n 1, at [92].
70 At [92].
71 Canadian Human Rights Act RSC 1985 c H-6, s 3(1).
72 Ajele and McGill, above n 7, at 7.
73 At 43.
74 *Baylis-Flannery v DeWilde* (2003) HRTO 28, [2003] OHRTD No 27.
75 At [143].

was flawed in its inability to accommodate discrimination based on race and gender. Instead, the Tribunal found it hazardous to adopt a single-axis approach, commenting that it would minimise the impact of discrimination experienced by women of colour.[76] The Canadian jurisdiction appears to be shifting from a traditional single-axis approach to recognising compounding disadvantages, thus obviating the need for a comparator.

Therefore, there is merit to s 21 of the HRA introducing a new subsection stating "[f]or the avoidance of doubt, discrimination may be based on one or more of the prohibited grounds listed in subsection (1), and on a combination of prohibited grounds."[77] Doing so explicitly highlights that multiple s 21 prohibited grounds of discrimination may be relied upon. Going one step further, s 22(1) of the HRA could be amended to give courts discretion to choose either the comparator or intersectional approach where appropriate. Abolishing the comparator approach would require extensive consideration and may still be an ideal tool for claimants facing discrimination on one ground. However, amending s 22(1) would grant a discriminated employee the flexibility to raise a claim based on one prohibited ground or a combination of prohibited grounds.[78]

Nevertheless, intersectionality is a "way of thinking".[79] To implement transformative change across all legal spectrums, Parliament, comprising of active tangata tiriti, tangata whenua and Pākehā must utilise their significant powers by adopting this mindset. Members of Parliament can work collaboratively to remediate legislation and policies that disproportionately impact specific identity groups.

Aotearoa New Zealand has also ratified numerous international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), which significantly influenced the NZBORA and the HRA.[80] Despite the ICCPR not explicitly referring to intersectional discrimination, the United Nations Human Rights Council (UNHRC) has long emphasised that discrimination should be interpreted as a restriction or exclusion based

76 At [145].
77 Chen, above n 1, at [92].
78 Reilly, above n 4, at 333.
79 Sumi Cho, Kimberlé W Crenshaw and Leslie McCall "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" (2013) 38 Journal of Women in Culture and Society 785 at 795.
80 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 232–236.

on a prohibited ground.[81] More recently, discussions on intersectional discrimination have gained prominence in international conferences. For example, the Committee on the Rights of Persons with Disabilities recognises that discrimination often amalgamates through multiple interweaving factors yet is seldom addressed within regulatory frameworks.[82] Instead, "[s]tate parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way…".[83] Abiding by the UNHRC observations would demonstrate Aotearoa New Zealand's commitment to leading in the human rights field. Fundamentally, fusing intersectionality and anti-discrimination law offers an analytical framework to understand the lived experiences of those with an intersecting identity.

V ADDITIONAL SUPPORTIVE MEASURES

Systemic change cannot be solely achieved through law reform, particularly as the encouragement of litigation is likely to be challenging and slow.[84] Furthermore, many Aotearoa New Zealand cases are resolved through early resolution without the need for a mediation meeting or litigation.[85] There has been a general declining trend in the number of claims directed to the HRRT. In 2017–2018 and 2018–2019, nine percent of the 1,370 and 1,350 claims, respectively, were referred, but this percentage dropped to seven percent of the 1,346 claims in 2019–20.[86] In 2020–2021, there was a slight uptick to eight percent of the 1,291 claims. However, in the 2021–2022 period, out of the 1,737 complaints, only 104 claims (six percent) were referred to the HRRT, with the majority being resolved or receiving assistance.[87]

Moreover, anti-discrimination law requires claimants to pursue a claim having recognised their discrimination. That is, "discrimination law is a mechanism which has to be activated and negotiated at an individual level". The process can be both daunting and emotionally taxing, particularly for a

81 United Nations Human Rights Committee *General Comment No 18*: *Non-discrimination* UN Doc HRI/GEN/1/Rev.9 (10 November 1989) at 7.

82 United Nations Human Rights Committee *General Comment No 6: Equality and Non-discrimination (Article 5)* UN Doc CRPD/C/GC/6 (26 April 2018) at 3.

83 United Nations Human Rights Committee *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)* UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) at 30.

84 Reilly, above n 4, at 333.

85 Human Rights Commission and The Office of Human Rights Proceedings Annual Report: Pūrongo ā Tau for the year ended 30 June 2022 (2022) at 27.

86 At 27.

87 At 27.

claimant who understands little of the legal framework. Furthermore, redress may not always address orthodox and structural inequalities perpetuated in the workplace.[88] Therefore, collective redress can be advanced through increased training and awareness of intersectional discrimination alongside enhanced reporting obligations. These recommendations affirm the HRC's function to "advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society".[89]

A Training Requirements

Given the expansive scope of s 19(1) of the NZBORA, intersectional discrimination has not been adequately addressed in the law, leaving discrimination to be frequently misunderstood or not recognised.[90] Seventy-six point four percent of Aotearoa New Zealand lawyers are Pākehā, suggesting that most legal practitioners may struggle to grasp the intricate interplay of race and gender.[91] As Pākeha lawyers comprise the majority of the legal workforce, there is a need for comprehensive training in identifying and bringing forward intersectional discrimination claims that encompass a claimant's whole identity.[92] Nonetheless, some academics fear that legal advocates may be incapable of adequately challenging oppressive practices due to the inherent power differential between lawyers and claimants.[93] Linda Alcoff, a feminist philosopher, worries that those with more power representing impacted individuals only reinforce systemic oppression against the claimant.[94] For instance, if a Pākehā male lawyer represents a Māori woman, the lawyer must advocate for a reality they have not conceptualised before meeting the client.[95]

Further, training should involve educating lawyers to understand their positionality, referring to how factors such as race and gender situate an individual to have more or less power within various contexts.[96] Positionality may impact how a legal advocate frames the client's issues and, thus, the quality

88 Reilly, above n 4, at 334.
89 Human Rights Act 1993, s 5(1)(a).
90 Sheena Smith and Klaus Starl *Locating Intersectional discrimination* (European Training and Research Centre for Human Rights and Democracy, Graz, November 2011) at 5.
91 Louise Brooks and Marianne Burt "Snapshot of the Profession 2022" (2022) 952 LawTalk 6 at 8.
92 Chen, above n 1, at [64].
93 Ajele and McGill, above n 7, at 36.
94 Linda Alcoff "The Problem of Speaking for Others" (1991) 20 Cult Crit 5 at 7.
95 Ajele and McGill, above n 7, at 35.
96 At 34.

of representation.[97] By understanding one's positionality, a lawyer can account for and mitigate their implicit bias to ensure their positionality does not unintentionally reinforce power structures that disadvantage the claimant.[98] A willingness to evolve and educate oneself is pivotal in achieving a holistic understanding of the intersectional nature of the discrimination experienced.

B Reporting Obligations

There is little data available on the intersection between ethnicity and gender within the Aotearoa New Zealand employment context. In the private sphere, employers have no obligations to report on gender equality.[99] In contrast, the public sphere is subject to minimal reporting requirements, with Government departments such as Statistics New Zealand and the Ministry of Women collecting data on ethnic and female representation.[100] The HRC audits annual reports to identify whether Crown entities comply with the "good employer obligation", mandating organisations to provide equal employment opportunities under the Crown Entities Act 2004.[101] However, the small group of employers subject to compliance policies results in limited data and fails to address the extent of the double disadvantage faced by indigenous women and women from ethnic minorities. Consequently, the scale of intersectional discrimination is difficult to measure.[102]

Extending reporting obligations would involve collecting data in various contexts, separating and categorising it into multiple factors, including disability, gender, ethnicity and age.[103] The requirement to disclose information would reveal patterns of intersectional discrimination, enabling employers to confront intersectional oppression they might have previously been unaware of. Transparent and readily available data holds employers accountable and may stimulate the use of quotas or targets to cater for frequently disadvantaged

97 At 35.

98 Dustin Rynders "Battling Implicit Bias in the Idea to Advocate for African American Students With Disabilities" (2019) 35 Touro L Rev 461 at 478.

99 Reilly, above n 4, at 334. This excludes the NZX Main Board stock exchange companies requiring a gender breakdown in annual reports.

100 Chen, above n 1, at [45].

101 Human Rights Commission "Crown Entities and the Good Employer: Annual Report Review 2007 to 2018" (25 March 2019) Good Employer HRC <good-employer.hrc.co.nz>.

102 Mai Chen *Superdiversity Stocktake: Implications for Business, Government, & New Zealand* (Super Diversity Centre, 2015) at [2.154].

103 Chen, above n 1, at [115].

groups by implementing affirmative action programmes.[104] The HRC "Tracking Equality at Work" tool could employ this data as the tool already assesses discrimination against multiple indicators in the employment context.[105]

However, the HRC's limited resource allocation hinders the implementation of this recommendation. As a public body, additional funding is necessary to enhance reporting requirements alongside the grant of power to enforce compliance with said reporting obligations.[106] Nonetheless, the HRC is well positioned to take the lead in increasing education and awareness of intersectional discrimination. Extending reporting requirements aligns with overseas jurisdictions and is an unostentatious method of compelling employers to acknowledge and address systemic workplace inequalities.

VI CONCLUSION

In upholding the fundamental right to freedom from discrimination, Aotearoa New Zealand must continue to enhance the understanding of, and advocate for, human rights within society. The imperative for supporting intersectional discrimination claims stems from the ongoing perpetuation of systemic oppression and demands direct and immediate attention. Despite the rich diversity that characterises Aotearoa New Zealand, the existing legal framework falls short in providing clear guidance for addressing complex intersectional disadvantage claims, a notable contrast to other progressive jurisdictions. Despite substantive legal discourse, the pursuit of transformative change in Aotearoa New Zealand has been lacklustre. However, adopting a multiple-ground approach to anti-discrimination claims, supported by comprehensive training initiatives and heightened reporting obligations, has the potential to propel Aotearoa New Zealand into becoming a progressive society that promotes affirmative action.

104 Reilly, above n 4, at 336.
105 Human Rights Commission, above n 22.
106 Reilly, above n 4, at 339.

LOOKING FORWARD FROM THE INDEPENDENT REVIEW PANEL'S REPORT: COMMENTARY ON THE REPORT AND COMPARISONS TO THE REGULATION OF HEALTH PRACTITIONERS

Jean Choi* **and Victoria Rea****

Both the legal and health professions have faced their respective watershed moments shining a light on the prevalence of issues concerning women. For health professionals, the pivotal moment was the "unfortunate experiment" at National Women's Hospital. The legal profession experienced its watershed moment during the disclosure of sexual harassment of young lawyers and summer clerks. The Independent Review Panel was established to evaluate the framework for the regulation and representation of legal services in Aotearoa New Zealand and delivered its final report in March 2023. Encouraged by the 30 years of transformation undergone by the health profession, we look forward from the Independent Review Panel Report and envision what an improved legal profession would look like. We make three key comparisons and recommendations: clarification on how sexual harassment is defined under the Lawyers and Conveyancers Act 2006; adopting a zero-tolerance position on sexual relationships with current clients; and mandatory cultural competency requirements to be embedded across all continuing professional development.

I INTRODUCTION

The Independent Review Panel, which was established to evaluate the framework for the regulation and representation of legal services in Aotearoa New Zealand, delivered its final report in March 2023. The initial spark that

* Jean Grace Choi is a registered optometrist (TPA endorsed) with ten years' experience working across Aotearoa New Zealand and Australia. Jean is completing her final year of a LLB (Hons) and is employed as a Research Assistant to Prof Mark Henaghan at the Faculty of Law, University of Auckland.

** Victoria Rea is admitted as a barrister and solicitor of the High Court of New Zealand. Victoria graduated from Te Herenga Waka — Victoria University of Wellington in 2018 with an LLB (Hons)/Bachelor of Arts and worked for five years at a boutique litigation firm and the Office of the Wellington Crown Solicitor. She is currently undertaking a Masters of Law at Duke University.

generated the momentum for the review was the disclosure in 2018 of sexual harassment of young lawyers and summer clerks.[1] In response, the New Zealand Law Society | Te Kāhui Ture o Aotearoa (NZLS) commissioned a Legal Workplace Environment Survey, which revealed that such incidents were not isolated.[2] A substantial proportion of lawyers reported experiencing sexual harassment and bullying throughout their legal careers.[3] Zoë Lawton, a female lawyer, set up an anonymous #MeToo blog where 214 people (89 percent women) shared their stories of sexual harassment within the legal profession.[4] At the time, several lawyers also documented concerns about the fitness of the regulation regime to discipline lawyers for sexual harassment and bullying conduct.[5] The NZLS established an Independent Working Group which issued a report (the Working Group Report)[6] revealing that unacceptable conduct by lawyers to lawyers had become "part of the fabric of the legal profession" and calls for change must be answered.[7] The report said while the current legal complaints system was an effective process for consumers, it was not fit for purpose to deal with unacceptable conduct by lawyers to lawyers, including sexual harassment, discrimination and bullying.[8] In seeking to address this, the NZLS commissioned an independent review of the legal profession's statutory and regulatory framework. The Independent Review Panel[9] released its report (the Independent Report) on 9 March 2023.[10]

1 Ron Paterson, Jane Meares and Jacinta Ruru *Regulating Lawyers in Aotearoa New Zealand: Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa* (New Zealand Law Society | Te Kāhui Ture o Aotearoa, March 2023) at 6.

2 New Zealand Law Society | Te Kāhui Ture o Aotearoa (NZLS) *Workplace Environment Survey* (May 2018) at 7.

3 At 6.

4 Belinda Feek "Zoë Lawton's #Metoo blog handed over to NZ Law Society" *The New Zealand Herald* (online ed, New Zealand, 9 April 2018).

5 B S, Bernadette Arapere, Kate Tarawhiti, Monique van Alphen Fyfe and Indiana Shewen, "State of the Nation — Tauākī o te Motu" [2018] NZWLJ 19; Allanah Colley, Ana Lenard and Bridget McLay, *Purea Nei: Changing the Culture of the Legal Profession* (December 2019) at 52–57.

6 Silvia Cartwright and others *Report of the New Zealand Law Society Working Group* (December 2018). The NZLS Working Group was comprised of the Hon Dame Silvia Cartwright (Chair), Jane Drumm, Joy Liddicoat, Prof Elisabeth McDonald and Philip Hamlin.

7 At 10.

8 At 12.

9 The Independent Review Panel was comprised of Prof Ron Paterson (Chair), Jane Meares and Prof Jacinta Ruru.

10 Paterson, Meares and Ruru, above n 1, at 5–6.

Women, less experienced lawyers, lawyers under 30 years old, law firm employees, Māori, Pasifika, and Asian lawyers, and those practicing in criminal and family law are most vulnerable to sexual harassment and workplace bullying.[11] The aim of this commentary is to provide a constructive view on how the legal profession could continue to strengthen protections for women[12] by using comparisons to the health profession. To begin, we will cover the reasons for comparing the health and legal professions and summarise the key findings of the Independent Report. The commentary will then make three key comparisons.[13] First, we will explore how sexual harassment by health practitioners towards their colleagues has been treated as misconduct in the disciplinary process and suggest improvements to equivalent conduct subject to the legal disciplinary process. Second, we will look at the zero-tolerance position adopted by the Medical Council of New Zealand | Te Kaunihera Rata o Aotearoa (MCNZ) regarding sexual relationships with clients and suggest improvements to the legal profession's approach. Finally, the commentary will compare cultural competencies in each profession and propose that cultural competency be embedded in mandatory legal continuing professional development (CPD).

II COMPARING THE LEGAL AND HEALTH PROFESSIONS

This comparison was chosen because the legal profession and the health profession have each experienced a well-documented watershed moment in Aotearoa New Zealand. In the health profession, the pivotal event was the

11 NZLS, above n 2.

12 The word "women" is used in this commentary because, between 2019 and 2023, all perpetrators in the Standards Committee and Lawyers and Conveyances Disciplinary Tribunal (LCDT) were men and all complainants were women. One of the suggested improvements for the next NZLS Workplace Environment Survey would be to ask respondents about their sexual orientation and gender identity, and provide a further breakdown of gender-diverse people (even if responses were <0.5% in the 2023 follow-up survey), to collect comparable data about the experiences of LGBTQIA+ members of the legal community. The authors recognise that LGBTQIA+ individuals are likely to be at a greater risk of experiencing sexual harassment, bullying and discrimination in the legal profession.

13 The Chair of the Independent Review Panel, Prof Ron Paterson, has been the Deputy Director-General of Health (in 1999), the Health and Disability Commissioner (from 2000 to 2010), and an Emeritus Professor at the University of Auckland specialising in teaching legal ethics and healthcare law. Hence, the authors acknowledge that Prof Ron Paterson may have already considered these aspects in developing the Independent Report.

"unfortunate experiment" at the National Women's Hospital.[14] This led to: the appointment of the Hon Dame Silvia Cartwright to conduct an inquiry in 1987;[15] the publication of the Cartwright Report in 1988; the enactment of the Health and Disability Commissioner Act 1994 and the introduction of the Code of Health and Disability Services Consumers' Rights in 1996.[16] Likewise the Independent Working Group, chaired by the same Dame Silvia Cartwright, described 2018 as "a watershed moment in the culture of the New Zealand legal profession",[17] leading to the Independent Report in 2023. Having experienced its watershed moment approximately 30 years ago, the health profession has already spent years developing policies and practices to better regulate its members. Hence, this commentary draws on the experience of the health profession to identify ways in which to improve the legal profession.

It might be argued that health and disability consumers are vulnerable people who cannot be easily compared to legal clients and legal colleagues. Thereby, legal clients and legal colleagues would not benefit from such a comparison. This would be an unduly narrow view. First, not all health and disability consumers are vulnerable. The word "consumer" was deliberately chosen in the Code of Health and Disability Services Consumers' Rights because the term "patient" medicalised people with disabilities,[18] and "client"

14 The "unfortunate experiment" was exposed in a 1987 article: Sandra Coney and Phillida Bunkle "An unfortunate experiment at National Women's" *Metro Magazine* (New Zealand, June 1987). This article described a research trial in 1966 by Dr Herbert Green, an Associate Professor of Obstetrics and Gynaecology at the National Women's Hospital, who believed carcinoma in situ (a lesion of the cervical epithelium) was not a premalignant disease. Dr Green followed women with cervical abnormalities "conservatively" without their knowledge or consent, which led to some women developing invasive cervical cancer and consequently their death. The article prompted the then-Minister of Health, Michael Bassett, to appoint a Committee of Inquiry in 1987. The Committee of Inquiry also looked at a second research trial where Dr Green took vaginal swabs of newborn female infants without parental consent to examine the histology of foetal cervices.

15 Silvia Cartwright *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters* (July 1988) at 4–6.

16 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

17 Cartwright and others, above n 6, at 10.

18 According to Prof Mike Oliver (who was a Professor of Disability Studies at the University of Kent (UK) and disability rights activist), there are "social" and "medical" models of disability. The traditional medical model views people with disabilities as being disabled solely by their physical impairments or differences. Whereas the social model views disability in the wider context of the systemic barriers created by society and social exclusion, which prevent people with disabilities from reaching their full potential.

could not capture people who underwent involuntary treatment.[19] The word "consumer" could also help correct the health professional and "patient" power imbalance. Second, some legal clients are extremely vulnerable. The legal profession needs to take a step back from the simplistic and paternalistic viewpoint that a lawyer-client relationship is voluntary and akin to a contract. Clients can be vulnerable due to intrinsic characteristics like an intellectual disability, extrinsic social circumstances like interpersonal violence, and financial circumstances like reliance on legal aid. Third, health and law affect all of us. At any moment, we could become a legal client in need of legal services, or a health and disability "consumer" within the health system. We can opt out of legal representation and healthcare, but we cannot opt out of the responsibility to abide by the law or avoid all conditions affecting our health. Moreover, even if we accepted the greater vulnerability of "patients" compared to legal clients, this is no justification for why legal colleagues should be unsafe in their profession. Every colleague should be able to work with the expectation that their profession will not subject them to widespread sexual harassment or bullying. Much can be learnt from the approach to regulation within the health profession.

III RECOMMENDATIONS OF THE INDEPENDENT REPORT

The current NZLS has dual functions of promoting the interests of the legal profession while regulating lawyers in the interests of the public.[20] The key recommendation of the Independent Report was to establish a new independent regulator to regulate lawyers in Aotearoa New Zealand.[21] The new regulator would be an independent statutory body,[22] the board of which would be appointed by the Minister of Justice following advice from a "nominations

19 Peter Skegg "A fortunate experiment? New Zealand's experience with a legislated code of patients' rights" (2011) 19 Med L Rev 235 at 239. Prof Peter Skegg suggests that the terminology of "client" would be particularly inappropriate for a person who underwent involuntary medical treatment at someone else's behest and expense.

20 Paterson, Meares and Ruru, above n 1, at 48.

21 At 8 and 15.

22 At 9, 15, 69, 79 and 81. The new regulator would not be a Crown entity, nor subject to directive powers or statements of policy from government.

panel",[23] with the panel being comprised of eight members, with an equal split of lawyer and public members, a public member as the chair and at least two members who bring strong te ao Māori insights.[24] The NZLS would perform a solely representative function as a membership body for lawyers, with a single governance layer — being a board comprising eight to ten members, including public members.[25]

The Independent Report recommended the new statute for regulation of lawyers include:

i) a stand-alone overarching Te Tiriti clause;[26]
ii) regulatory objectives designed to "protect and promote" the public interest;[27] and
iii) a new fundamental obligation for lawyers "to maintain their competence and fitness to practise in their areas of practice".[28]

The new regulator would maintain the current focus on lawyers and conveyancers.[29] However, the new statute would expand the scope of permitted legal services by:

i) introducing a new "freelance" practising model, permitting lawyers to provide services to the public in non-reserved areas without prior approval from the regulator;[30]
ii) allowing for employed lawyers to provide pro bono services to

23 At 9, 15, 79 and 85–86. The "nominations panel" would compromise individuals nominated by consumer groups and legal representative bodies such as the New Zealand Law Society and Te Hunga Rōia Māori o Aotearoa. The Independent Report proposed a convention that the Minister only departs from appointment recommendations with good reason, to be provided in writing and publicly disclosed at the time of new appointments. Appointment terms would be for up to four years, with a maximum tenure of 10 years.

24 At 9, 15, 79, 82–84.

25 At 9, 15 and 88.

26 At 9, 15, 94 and 174. The recommended Te Tiriti clause would provide that "[a]ll persons exercising powers and performing functions and duties under this Act must give effect to the principles of Te Tiriti o Waitangi."

27 At 9, 15 and 96–97. The regulatory objectives would include upholding the rule of law and facilitating the administration of justice, improving access to justice and legal services, promoting and protecting the interests of consumers, promoting ethical conduct and the maintenance of professional competence in the practice of law, and encouraging an independent strong, diverse and effective legal profession.

28 At 10, 15 and 103–104. This would include developing and maintaining cultural competence.

29 Paterson, Meares and Ruru, above n 1, at 15, 110 and 114–115.

30 At 10, 15, 110, 116, 119 and 174. The "freelance" legal services model would be conditional on the lawyer's practice being confined to non-reserved areas, and the lawyer would be required to practice on their own, in their own name, not employ anyone, not handle client funds and be engaged directly by clients.

the public in non-reserved areas without prior approval from the regulator;[31] and

iii) removing the prohibitions on non-lawyers having an ownership interest in law firms and joining legal partnerships.[32]

The new regulator would have tools to better protect consumers and maintain lawyer competence, including powers to:

i) suspend a practicing certificate pending the outcome of a disciplinary process;[33]
ii) intervene without the need for a disciplinary or fault-based finding when concerns arise about a lawyer's fitness to practise;[34]
iii) undertake practice reviews to monitor compliance with professional and ethical standards within law firms;[35]
iv) impose bespoke conditions on a practising certificate;[36] and
v) require a portion of CPD to include core mandatory CPD categories, which could change on a rolling basis.[37]

There would be a reformed complaints system, including:

i) separating complaints about "consumer matters" to go through an informal dispute resolution process;[38]
ii) reserving the resources of the regulator to investigate matters capable of amounting to "unsatisfactory conduct" or

31 At 10–12, 15, 110, 122 and 184–185. The "pro bono" legal services model would be conditional on the lawyer's practice being confined to non-reserved areas and provided at no cost and would require that the lawyer does not handle client funds. The Independent Report recommended that the new regulator could examine extending this to reserved areas with additional protections over time.

32 At 11, 15, 110, 122 and 127. The current restriction prohibits anyone other than an actively involved lawyer from holding shares or being a director in an incorporated law firm, and lawyers from entering into partnerships with non-lawyers.

33 At 12, 15 and 135. The regulator would need to be satisfied that the lawyer posed a risk of serious harm to the public or to public confidence in the legal profession.

34 At 12, 15 and 135. This would include the power to direct a lawyer to undergo a health or competence review and associated remedial measures, and to undertake further training.

35 At 12, 15 and 135.

36 At 12, 15 and 135–136. Examples of bespoke conditions would be to limit the lawyer's scope of practice or require active supervision.

37 At 12, 15, 130 and 141. Examples of mandatory topics include legal ethics, tikanga, te reo, cyber-security and technology.

38 At 13, 16, 76, 143 and 161–165. Examples of "consumer matters" include complaints about fees, delay and poor communication. The exception would be complaints about lawyers' fees that are so egregious that they require disciplinary investigations and sanctions.

"misconduct", with such complaints being dealt with by in-house specialist staff;[39]

iii) limiting the time for bringing complaints — the Independent Report suggested one to two years;[40]

iv) limiting public disclosure of the identity of a lawyer found to have engaged in "unsatisfactory conduct" to exceptional cases;[41] and

v) subjecting lawyers to a new duty to ensure complaints are dealt with promptly, fairly, and free of charge.[42]

The Independent Review Panel acknowledged that a new regulator "cannot change the culture of the profession by itself", for the purposes of improving diversity, inclusion, conduct and mental health.[43] However, the new regulator can encourage diversity and inclusion by:

i) implementing the proposed new statutory objective of "encouraging an independent, strong, diverse and effective legal profession";[44]

ii) removing regulatory barriers which have a discriminatory effect;[45] and

iii) collecting and regularly publishing information on the diversity of the legal profession.[46]

39 Paterson, Meares and Ruru, above n 1, at 13, 16, 143 and 161–168. The Legal Complaints Review Officer (LCRO) and Standards Committees would be disestablished. The LCRO would be replaced by a small review committee or an external adjudicator. Instead of the Standards Committee model, the regulator itself would be able to make determinations of "unsatisfactory conduct" and investigate cases which reach the threshold requiring prosecution of "misconduct" before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT).

40 At 162 and 168.

41 At 13, 16, 162 and 165–166. The identities of lawyers found guilty of "misconduct" by the LCDT would continue to be publicly disclosed.

42 At 13, 16, 143, 162 and 167–168.

43 At 13.

44 At 10, 16, 96 and 98–99.

45 At 14, 16, 117–121 and 173–177. Examples include the minimum hours that lawyers must have worked in the past five years for admission as a sole practitioner, which unjustifiably penalises those who have taken time off paid work, character referee requirements for admission which can be exclusionary, and requiring disclosure of mental health conditions when applying for admission and for annual renewal of practising certificates.

46 At 16, 169, 173–174 and 178. The objective of this would be to report on aggregate trends within the legal profession.

IV SEXUAL HARASSMENT AND BULLYING

In 2018, the Working Group Report said the legal profession needs to "hold up a mirror to itself and to make a commitment to implementing change".[47] The 2018 Legal Workplace Environment Survey revealed that 18 percent of lawyers had experienced sexual harassment in their career.[48] The prevalence was higher for women, with 31 percent of female lawyers experiencing sexual harassment.[49] Sexual harassment was mainly by lawyers to lawyers, with the most common perpetrators being law firm partners or supervisors (52 percent) and senior legal colleagues (26 percent), followed by clients (14 percent).[50]

The issue of unacceptable conduct by doctors to doctors is less prevalent in comparison to lawyers.[51] In a 2018 survey conducted by the New Zealand Resident Doctors' Association, 17 percent of resident doctors reported that they had experienced sexual harassment in the past year.[52] However, the most common perpetrators of sexual harassment against resident doctors were patients (60 percent), followed by senior colleagues (38 percent).[53]

Moreover, the legal profession appears to experience more workplace bullying than the medical profession.[54] The Legal Workplace Environment Survey in 2018 revealed that 79 percent of lawyers have experienced workplace bullying in the past six months.[55] In comparison, 49.9 percent of senior salaried doctors and dentists who responded to a survey conducted by

47 Cartwright and others, above n 6, at 10.

48 NZLS, above n 2, at 6. This statistic used the definition of "sexual harassment" adopted by the Human Rights Commission: "Sexual harassment is any unwelcome or offensive sexual behaviour that is repeated, or is serious enough to have a harmful effect, or which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment" and "can involve spoken or written material, images, digital material or a physical act" (see NZLS, above n 2, at 15).

49 At 6.

50 At 25.

51 There is no directly comparable survey of all doctors in Aotearoa New Zealand, therefore this commentary has referred to which "type" of doctors were surveyed by the publications cited in the following footnotes.

52 Deborah Powell *Secretariat Report 2018* (New Zealand Resident Doctors' Association, 2018) at 16. The New Zealand Resident Doctor's Association represents Resident Medical Officers including trainee interns, house surgeons, senior house officers and registrars.

53 At 16.

54 The 2018 Legal Workplace Environment Survey used the same Negative Acts Questionnaire (NAQ-r) methodology as the Association of Salaried Medical Specialists (see NZLS, above n 2, at 32). One limitation is that the surveys do not cover the same timespan: the Association of Salaried Medical Specialists Survey was open from June to July 2017 and the Legal Workplace Environment Survey was open from April to May 2018.

55 NZLS, above n 2, at 38.

the Association of Salaried Medical Specialists in 2017 reported experiencing some form of work-related bullying in the past six months.[56]

The NZLS commissioned a follow-up Legal Workplace Environment Survey in 2023.[57] There was a slight improvement in the rates of sexual harassment; the prevalence of sexual harassment among all lawyers dropped by five percent.[58] Nevertheless, 22 percent of lawyers still reported experiencing sexual harassment in the last five years.[59]

V UNSATISFACTORY CONDUCT AND MISCONDUCT

The Independent Report was a missed opportunity to clarify whether sexual harassment falls under "unsatisfactory conduct" or "misconduct" in the Lawyers and Conveyancers Act 2006.[60] The New Zealand Women's Law Journal | Te Aho Kawe Kaupapa Ture a ngā Wāhine (NZWLJ) wrote a submission to the NZLS about proposed amendments to the Lawyers and Conveyancers Act regarding this issue in 2022.[61] At the time, the NZWLJ was "hopeful that further amendments [would] result from the independent review".[62] However, the Independent Report did not provide a solution or recommendation to clarify this.[63]

56 Association of Salaried Medical Specialists "Bullying in the New Zealand senior medical workforce: prevalence, correlates and consequences" (2017) 14 Health Dialogue 1 at 2 and 13. The New Zealand Association of Salaried Medical Specialists represents senior salaried doctors and dentists in roles which require them to hold a practicing certificate, and most members work in the public hospital system.

57 NZLS *2023 Workplace Environment Survey* (October 2023).

58 At 5. The previous Human Rights Commission definition of "sexual harassment", used in the 2018 Legal Workplace Environment Survey, was replaced by the definition provided by r 1.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 in the 2023 Legal Workplace Environment Survey. Rule 1.2 defines "sexual harassment" as "subjecting another person to unreasonable behaviour of a sexual nature that is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person)" or "a request made by a person of any other person for sexual intercourse, sexual contact, or any other form of sexual activity, that contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment". However, any comparative analysis between surveys used the "behavioural" definition (on page 18) which was consistent between 2018 and 2023.

59 At 5.

60 The relevant definitions of "misconduct" and "unsatisfactory conduct" are found in ss 7 and 12 of the Lawyers and Conveyancers Act 2006, respectively; neither definition contains reference to sexual harassment.

61 New Zealand Women's Law Journal | Te Aho Kawe Kaupapa Ture a ngā Wāhine (NZWLJ) *Submission on proposed amendments to the Lawyers and Conveyancers Act 2006* (13 February 2022).

62 At [17].

63 Paterson, Meares and Ruru, above n 1. The report recommended that the Legal Complaints Review Officer and Standards Committees be disestablished. However, there was no explanation of how the new regulator should approach the specific issue of whether sexual harassment amounts to "unsatisfactory conduct" or reaches the threshold requiring prosecution of "misconduct" before the LCDT.

Rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, introduced in July 2021, provides that a lawyer must not engage in conduct amounting to bullying, discrimination, harassment, sexual harassment, racial harassment or violence.[64] However, there is no clarity about whether sexual harassment comes under the definitions of "unsatisfactory conduct", dealt with by Standards Committees, or "misconduct", dealt with by the Lawyers and Conveyancers Disciplinary Tribunal (LCDT). Interestingly, there has been a steady increase in LCDT decisions about unacceptable sexual conduct by lawyers to lawyers from 2019 to 2023.[65]

The definition of "unsatisfactory conduct" is provided under s 12 of the Lawyers and Conveyancers Act. That definition includes, first, conduct by a lawyer at a time when they are providing "regulated services" which "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".[66] This looks at the reasonable expectations of ordinary people.[67] Second, the definition captures conduct by a lawyer providing "regulated services" that "would be regarded by lawyers of good standing as being unacceptable", including conduct which is "unbecoming" or "unprofessional".[68] This looks at what lawyers of good standing would consider unacceptable. The other two types of "unsatisfactory conduct" involve a contravention of the Lawyers and Conveyancers Act, or regulations made under it, and a failure to comply with a condition or restriction to which a practising certificate is subject.[69] By comparison, the threshold for "misconduct" — as defined in s 7 — is higher. There are four categories of conduct occurring at a time when "regulated services" are being provided that will amount to "misconduct". First is conduct of a lawyer "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable".[70] Disgraceful or dishonourable is a higher threshold than unacceptable. Second is conduct that consists of a "wilful or reckless

64 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 10.3.

65 There have been four decisions out of 40 in 2023, two out of 37 in 2022, two out of 20 in 2021, zero out of 32 in 2020 and zero out of 26 in 2019. This methodology treats repeat decisions involving the same defendant and the same complaint (substantive, penalty or name suppression decisions, or both) as one data point.

66 Lawyers and Conveyancers Act, s 12(a).

67 Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 103.

68 Section 12(b).

69 Section 12(c)–(d).

70 Section 7(1)(a)(i).

contravention of any provision" of the Lawyers and Conveyancers Act or any regulations made under it.[71] The other two categories involve a wilful or reckless failure to comply with a condition or restriction to which a practising certificate is subject, and the charging of grossly excessive legal fees.[72]

This commentary highlights that there continues to be uncertainty about whether sexual harassment is "misconduct" or "unsatisfactory conduct", or both. A recent LCDT decision and a recent Standards Committee decision illustrate the point. In *Palmer,* the LCDT found three charges of "misconduct" to be proved against Mr Richard Palmer, a senior lawyer, in 2022.[73] The first charge related to when he drove two summer clerks to lunch in 2015, purchased "strong liquor", detoured to an adult sex shop, obtained business cards from the sex shop assistant and handed them to each woman.[74] The second charge related to an incident at a client lunch in 2017 when Mr Palmer inappropriately, and without consent, touched a more junior lawyer on her leg, knee and shoulder, and stroked her hair.[75] The third charge related to when, in 2017, Mr Palmer persistently emailed a female first-year solicitor while intoxicated suggesting a one-on-one dinner outside working hours, with his emails containing sexual innuendos.[76] A similar Standards Committee decision concerned another senior male lawyer[77] who, at a professional social event, repeatedly touched a female lawyer's arm and inappropriately encouraged her to consume more alcohol; he later grabbed her lower back and bottom as she passed him on the dance floor.[78] The details of the senior lawyer's conduct parallel the second charge against Mr Palmer. However, unlike in *Palmer*, the Standards Committee determined that this lawyer's actions only amounted to "unsatisfactory conduct" and did not refer the matter to the LCDT for consideration of whether the lawyer was guilty of "misconduct".[79]

71 Section 7(1)(a)(ii).

72 Section 7(1)(a)(iii)–(iv).

73 *National Standards Committee (No 1) v Palmer* [2022] NZLCDT 42 (substantive decision) at [20]–[63]. This was followed by *National Standards Committee (No 1) v Palmer* [2023] NZLCDT 13 (penalty decision) and *National Standards Committee (No 1) v Palmer* [2023] NZLCDT 15 (penalty orders).

74 *Palmer* (substantive decision), above n 73, at [2]–[3] and [20]–[35].

75 At [38]–[48].

76 At [49]–[63].

77 The lawyer's identity has not been publicly disclosed.

78 NZLS "Lawyer's behaviour at professional social event determined to be unsatisfactory conduct" (2022) <www.lawsociety.org.nz>.

79 NZLS, above n 78. It should be noted, however, that this decision was made before the LCDT released its substantive decision in the Gardner-Hopkins case: *National Standards Committee (No 1) v Gardner-Hopkins* [2021] NZLCDT 21.

The same interpretive difficulty arises in respect of unacceptable conduct by lawyers that is directed to legal staff. A Standards Committee decision in 2023 involved a partner[80] at a law firm sending multiple text messages to a legal executive employed by that law firm, late at night, which "contained a sexual connotation".[81] The partner asked if they could come into the employee's home, if the employee was "ready" for bed, and attempted to call the employee 16 times between 11.30 pm and 1.00 am.[82] These details are similar to some extent to Mr Palmer's third charge, involving the inappropriate email thread. However, once again this was only determined to be "unsatisfactory conduct" by the Standards Committee and the matter was not referred to the LCDT.[83]

The counterargument against comparing *Palmer* to the two Standards Committee decisions is that Mr Palmer engaged in unacceptable conduct on multiple occasions, involving multiple complainants, and the determination of "misconduct" could be a cumulative outcome. However, the LCDT found *each* of the three charges proved to the standard of "misconduct".[84] Thereby, considerations of cumulative effect and the totality of the offending were reserved to the penalty stage.[85]

In comparison to the disciplinary process for lawyers, "health practitioners"[86] are disciplined by the Health Practitioners Disciplinary Tribunal (HPDT) for "professional misconduct"[87] under s 100(1) of the Health Practitioners Competence Assurance Act 2003. The relevant provision for sexual harassment of a colleague[88] is s 100(1)(b), under which a health

80 The lawyer's identity has not been publicly disclosed.

81 NZLS "Intoxicated Partner sending text messages to employee late at night which 'contained a sexual connotation', found to be unsatisfactory conduct" (2023) <www.lawsociety.org.nz>.

82 NZLS, above n 81.

83 NZLS, above n 81.

84 *Palmer* (substantive decision), above n 73, at [79].

85 At [80].

86 This term includes practitioners of the following professions: medicine; medical imaging and radiation therapy; medical laboratory science; nursing; midwifery; occupational therapy; optometry and optical dispensing; chiropracy; osteopathy; dentistry; dietetics; pharmacy; paramedic services, physiotherapy; anaesthetic technology; Chinese medicine services; podiatry; psychology and psychotherapy.

87 Joanna Manning "Professional Discipline of Health Practitioners" in Ron Paterson and Peter Skegg (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 927 at 935. "Professional misconduct" was defined in *Martin v Director of Proceedings* [2010] NZAR 333 (HC) at [19] as "unacceptable or improper behaviour by a person who practises a profession".

88 This commentary focuses on sexual harassment of a colleague which does not amount to criminal conduct. Whereas, a charge of sexual misconduct against a health or disability consumer, or both, could be brought under s 100(1)(a) of the Health Practitioners Competence Assurance Act 2003 as "professional misconduct" which involves an act or omission that amounts to malpractice or negligence in relation to the practitioner's scope of practice.

practitioner may be disciplined for "professional misconduct" if any of their acts or omissions have "brought or [were] likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred". This extends disciplinary sanction to a health practitioner's personal actions[89] which have a professional connection, such that they are likely to bring discredit to the profession.[90] There is a two-stage enquiry.[91] At the first stage, the HPDT will consider if the practitioner departed from acceptable professional standards, bearing in mind the purpose of the Act to protect the public,[92] community expectations, and professional standards of competent and ethical peers.[93] In the second stage, the HPDT will assess if the departure from acceptable professional standards "is significant enough to warrant sanction".[94] The second stage of the inquiry is intended to prevent "minor human errors" from attracting a disciplinary response.[95]

The health practitioner's threshold of "professional misconduct" in the HPDT should be similar to the lawyer's "misconduct" in the LCDT. Comparatively, the HPDT has a long history of finding sexual harassment against colleagues as requiring disciplinary sanction. In *Chand*, a 2007 decision of the HPDT, the actions of a male nurse who attempted to kiss a female nursing colleague, pushing his groin and hip into her as she pulled away, amounted to professional misconduct.[96] The HPDT determined two more

89 Manning, above n 87, at 946. Section 100(1)(b) extends to actions which are not directly connected with the health practitioner's usual professional duties.

90 Manning, above n 87, at 942 and 946–947. The Nurses Act 1977 was influential in the interpretation of s 100(1)(b). *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [4]–[5], [18] and [25] held that the health practitioner's conduct had to bear "some logical link" or "connection" to the profession, its standards and public expectations of its members — such as a nurse accepting substantial sums of money from an elderly couple who were patients at the GP practice she worked in. Whereas, there are "countless examples of behaviour that is entirely personal and private and not likely to bring discredit to the profession", such as "cheating at cards; telling lies in a private capacity" and "being unfaithful to a partner": at [25].

91 Manning, above n 87, at 936; and *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA) at [80].

92 Section 3(1) of the Health Practitioners Competence Assurance Act provides "the principal purpose of this Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions."

93 Manning, above n 87, at 936–937; and *B v Medical Council of New Zealand* [2005] 3 NZLR 810 (HC) per Elias J at 810–811, approved in *F v Medical Practitioners Disciplinary Tribunal*, above n 91, at [57].

94 Manning, above n 87, at 936 and 939–940; and *F v Medical Practitioners Disciplinary Tribunal*, above n 91, at [80].

95 Manning, above n 87, at 939–940; and *Martin v Director of Proceedings*, above n 87, at [23].

96 *Dalip Chand* 106/Nur06/49P (substantive decision) at [23]–[28], [41]–[43], [57], [66]–[67] and [84]–[110], followed by 109/Nur06/49P (penalty decision).

cases of professional misconduct in 2012. In *Mlilo*, a male nurse pushed a female healthcare assistant colleague into a locker room, embraced her, and attempted to kiss her. This was held to be professional misconduct.[97] In *Wilson,* a male nurse behaved inappropriately towards two female nursing students on placement by stroking their legs and thighs, attempting to kiss them, and discussing sexual activities — this was also found to amount to professional misconduct.[98]

In *Adolf*, a 2020 decision, the HPDT determined that the actions of a male medical imaging technologist amounted to professional misconduct: he had demanded a female hospital cleaner give him a massage, then shut her into a room, grabbed and hugged her, asked her for her phone number and attempted to kiss her.[99] Last, in *Lunar*,[100] a 2023 decision, the HDPT sent "a strong signal" when imposing penalties under s 101 of the Health Practitioners Competence Assurance Act "that sexual harassment towards professional colleagues is conduct that will not be tolerated in the nursing profession *or any* health profession".[101]

We argue the legal profession should take the same strong position and ensure that all sexual harassment directed towards colleagues falls under the definition of "misconduct" in s 7, as a strong deterrent of such conduct. Any sexual harassment by a lawyer providing regulated services towards their colleagues should "reasonably be regarded by lawyers of good standing as disgraceful or dishonourable" under s 7(1)(a)(i) of the Lawyers and Conveyancers Act.

VI SEXUAL RELATIONSHIPS WITH CLIENTS

Since the Independent Report only examined unacceptable sexual conduct by lawyers to lawyers and legal staff, this was a missed opportunity to examine

97 *Sikhumbuzo Mlilo* 437/Nur11/196P (substantive decision) at [5]–[10] and [24], followed by 453/Nur11/196P (penalty decision).

98 *Jessie Wilson* 458/Nur12/203P (substantive decision, where Mr Wilson still had name suppression as "Mr N") at [1]–[3], [27]–[56] and [99]–[105], followed by 467/Nur12/203P (penalty decision).

99 *Rejinold Adolf* 1077/MRT19/463P (substantive decision) at [1]–[8], [13]–[28] and [62]–[77], followed by 1086/MRT19/463P (penalty decision).

100 *Gareth Lunar* 1305/Nur22/564P (substantive and penalty decision). This case concerned sexual harassment by a male nurse towards a female nursing colleague, involving repeatedly asking his colleague on a date (requests which she declined), asking if she was watching porn, and asking her to masturbate him and making masturbation gestures. This amounted to professional misconduct under s 100(1)(a) and (b) of the Health Practitioners Competence Assurance Act: see [69]–[150].

101 *Lunar*, above n 100, at [210] (emphasis added).

the issue of sexual relationships with clients. Under r 5.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, a lawyer must not enter into "an intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client". This is not a total prohibition.[102]

There is a stricter rule under r 5.7.1, which provides that a lawyer must not enter into an "intimate personal relationship" with a client "where the lawyer is representing the client in any domestic relations matter". "Domestic relations" refers to matters dealt with by the Family Court, including relationship property matters under the Property (Relationships) Act 1976.[103]

The definition of an "intimate personal relationship" is not provided in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules. Previous cases like *Daniels v Complaints Committee 2 of the Wellington District Law Society* and *Canterbury Westland Standards Committee v Horsley* indicate that a sexual relationship would be an "intimate personal relationship" which is inconsistent with the trust and confidence reposed by the client if that client is vulnerable. In *Daniels,* the client was a vulnerable and impoverished woman where the lawyer acted for her in interpersonal violence matters against an abusive partner, care of children matters (including the care of a child who was intellectually handicapped), and criminal proceedings.[104] In *Horsley,* the client was vulnerable as a young woman who was a victim of abuse and who had ongoing alcohol dependency and mental health issues.[105]

In comparison, the Medical Council holds a zero-tolerance position in respect of doctors engaging in sexual relationships with current patients.[106] We argue the new regulator should take a similar zero-tolerance position on lawyers who have sexual relationships with any current client[107] because, like a doctor-patient relationship, there are inherent power imbalances in a

102 Richard Scragg *The Ethical Lawyer: Legal Ethics and Professional Responsibility* (Thomson Reuters, Wellington, 2018) at 247.

103 At 247.

104 *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [7], [11], [37] and [69].

105 *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 9 (substantive decision) at [7]–[30] and [34]–[49], followed by *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47 (penalty decision).

106 Medical Council of New Zealand | Te Kaunihera Rata o Aotearoa (MCNZ) *Sexual boundaries in the doctor-patient relationship* (November 2018) at 2.

107 This would extend past the current ambit of r 5.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, to include clients outside domestic relations matters.

lawyer-client relationship. There is an exchange of trust where the client shares and discusses private, confidential, and often personal information with their lawyer. Like a doctor-patient interaction, this sharing of personal information is not reciprocal and creates a one-sided relationship.[108] Clients, like patients, may become emotionally reliant on their lawyer when seeking assistance or guidance,[109] which allows lawyers to influence and manipulate clients into sexual relationships, where the question of consent is complicated.[110] As discussed previously, there is the opposing view that the power imbalance is lesser between lawyers and clients, compared to doctors and patients. However, the "power imbalance theory [in lawyer-client relationships] exists because of two factors".[111] The first factor is that the lawyer has specialised authority, standing as a legal professional and knowledge of the legal system.[112] The second factor is "the client's vulnerability that arises from the need for legal advice and protection".[113]

A Standards Committee decision in 2020 reiterated that the rationale behind rr 5.7 and 5.7.1:[114]

> … is clearly intended to be a reflection of the fact that a lawyer who enters into an intimate personal relationship with their client may become compromised in their ability to exercise independent judgement in relation to their client's affairs.

In domestic disputes, a "lawyer who is emotionally-invested in a client's matter may lose their objectivity" which "may adversely impact on the lawyer's representation of the client, and even exacerbate pre-existing conflict".[115] However, emotional investment is not limited to domestic matters — it can extend to criminal matters[116] and other civil matters such as accident compensation claims involving personal injury. Moreover, sexual involvement can impair both the lawyer and client's decision making. This may not only

108 MCNZ, above n 106, at 2.
109 At 2.
110 Lynda Crowley-Cyr and Carol Caple "Sex with clients and the ethical lawyer" (2001) 8 JCULR 67 at 71–72 and 76.
111 At 71.
112 At 71.
113 At 71.
114 NZLS "Fined for intimate relationship with client" (3 April 2020) <www.lawsociety.org.nz>.
115 NZLS, above n 114.
116 Crowley-Cyr and Caple, above n 110, at 71–72.

impact the lawyer's legal representation, but it could also cloud the lawyer's judgement about the existence of the client's consent in the first instance.[117] Accordingly, this commentary takes the position that all sexual relationships between lawyers and clients should be prohibited.

The Medical Council does allow a limited exception for sexual relationships with *former* patients, in certain circumstances.[118] As such, this commentary recommends the new regulator conducts case-by-case reviews of complaints involving sexual relationships between lawyers and former clients. Drawing on the approach of the Medical Council, considerations should include the vulnerability of the client (such as any relevant medical impairments or history of sexual abuse), nature of the lawyer-client relationship (if it was minor or temporary) and whether the lawyer-client relationship was ended in order to initiate the sexual relationship.[119] For example, if a lawyer assists a client in respect of an agreement for sale and purchase of property and later that client requests a personal meeting where they engage in a consensual relationship with no further legal advice provided, the lack of coercion and client vulnerability would be considered.

VII MANDATORY CONTINUING EDUCATION

The Independent Report acknowledged that the current CPD model "is a blunt instrument" for maintaining competence and has become a "tick-box exercise".[120] Rule 3.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules provides that a lawyer must undertake the CPD necessary to ensure an adequate level of knowledge and competence in their fields of practice. In addition, lawyers are required to have a written CPD plan and complete a minimum of 10 hours of CPD per year.[121] There are no further requirements regarding the types of training lawyers must undertake.

By way of comparison, there is a greater emphasis on cultural competence in CPD requirements for doctors. The Medical Council even goes further, providing that "[c]ultural safety and a focus on health equity must be embedded across and

117 At 72.
118 MCNZ, above n 106, at 5.
119 At 5.
120 Paterson, Meares and Ruru, above n 1, at 12 and 139.
121 Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education — Continuing Professional Development) Rules 2013, rr 4–6.

within *all*" CPD categories.[122] "Cultural safety" includes understanding how the colonial history of Aotearoa New Zealand, systemic bias and inequities have impacted Māori, and ensuring that doctors do not perpetuate these inequities in their interactions with patients.[123] Promoting health equity in this context involves acknowledging the Indigenous rights of Māori within Aotearoa New Zealand and supporting the principles of Te Tiriti o Waitangi.[124] In addition to indigenous status and ethnicity, cultural safety has regard to a range of other cultural dimensions including age or generation, gender, socioeconomic status, sexual orientation, disability and religious or spiritual beliefs.[125]

Lawyers may counterargue that, while mandatory cultural competence requirements might contribute to positive treatment outcomes in healthcare,[126] the same cannot be said for law and the provision of legal services. Again, this would be an unduly narrow view. There are many situations in which cultural competency is essential for the provision of legal services. For example, cultural competency is vital in matters such as real estate transactions where Māori land rights are involved and when dealing with contractual agreements, to understand the parties and how they relate to each other. As the Independent Report said, "a competent lawyer is one who understands [the consumer's] needs and is responsive to the client's culture".[127] Sensitivity to wider cultural dimensions of clients and other lawyers, including age, gender, socioeconomic status, sexual orientation, disability, ethnicity and religion, is essential in providing legal services tailored to the client's needs.[128]

It is positive to see that the Independent Report recommended that the new regulator mandate some components of CPD on a rolling basis, which could include topics like tikanga Māori, te reo Māori, unconscious bias, anti-bullying and harassment.[129] Moreover, the Independent Report recommended mandatory CPD should be freely available,[130] which would ensure all lawyers

122 MCNZ *Recertification requirements for vocationally-registered doctors in New Zealand* (November 2019) at 6 (emphasis added).
123 MCNZ *Statement on cultural safety* (October 2019) at 9.
124 At [14].
125 At [6] and [15].
126 MCNZ, above n 123, at [1]–[6].
127 Paterson, Meares and Ruru, above n 1, at 98.
128 At 98.
129 At 141.
130 Paterson, Meares and Ruru, above n 1, at 141. The Panel commented that any mandatory CPD courses "would likely need to be made freely available" and this "would increase the regulatory costs of monitoring and compliance".

can participate without being bound to an employer who covers their costs.[131] However, although the NZLS was given the power to specify mandatory CPD topics in July 2021,[132] the Independent Report confirmed the NZLS has not yet used that power.[133] Therefore, we recommend that cultural competence training should be mandatory and "embedded within all" CPD categories, as it is for doctors.[134] This would be instead of introducing individual mandatory categories which risk becoming another "tick-box exercise".[135] This will also align with the Independent Report's proposed statutory objective for the new regulator, of maintaining "professional competence, including cultural competence, in the practice of law".[136]

VIII CONCLUSION

As we have acknowledged, both the legal and health professions have faced their respective watershed moments. For health professionals, this came after the disclosure of the "unfortunate experiment" in 1987.[137] The legal profession experienced its watershed moment many years later, in 2018, after the disclosure of sexual harassment of young lawyers and summer clerks.[138] It has been approximately 30 years since the creation of the Health and Disability Commissioner Act 1994. Hence, this commentary drew on comparisons between the legal and health professions to explore how regulation of the legal profession could be improved to address the pervasive problems that remain.

One of the main drivers for the Independent Report was to respond to unacceptable conduct by lawyers to lawyers.[139] The initial Legal Workplace

131 NZWLJ *Feedback on the Independent Review Panel's report "Regulating Lawyers in Aotearoa New Zealand | Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa"* (31 May 2023) at [36]. The NZWLJ was suggested that any mandatory CPD courses should be "provided for limited or no fees" to "ensure that lawyers can participate without being subsequently bound to employment for a period of time if their costs are covered by their employer".

132 This power is provided in s 97(2)(a) of the Lawyers and Conveyancers Act and r 4.1(b) of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education — Continuing Professional Development) Rules.

133 Paterson, Meares and Ruru, above n 1, at 138.

134 MCNZ, above n 123, at 6. This would also reflect the growing recognition of the importance of tikanga Māori in all legal practice, as reflected by the New Zealand Council of Legal Education's decision to include the teaching and assessment of tikanga Māori as a component of all LLB degrees in Aotearoa New Zealand from 1 January 2025 onwards.

135 Paterson, Meares and Ruru, above n 1, at 139.

136 At 9–10.

137 Coney and Bunkle, above n 14.

138 Cartwright and others, above n 6, at 10.

139 Paterson, Meares and Ruru, above n 1, at 29.

Environment Survey in 2018 and follow-up survey in 2023 reported that women are most vulnerable to sexual harassment and general bullying within the legal profession.[140] Therefore, this commentary provided a constructive look at how the legal profession could strengthen protections for women by using comparisons to the health profession. The legal profession we envision would allow every lawyer to work with the expectation that they would be protected from widespread sexual harassment or bullying. Moreover, legal clients should be afforded the same protections from the exploitation of power imbalances and vulnerabilities as those that exist between patients and doctors in the health profession. We recommended the following immediate and proactive steps: clarifying where sexual harassment between colleagues falls in respect of the definitions of "unsatisfactory conduct" and "misconduct" in the Lawyers and Conveyancers Act; adopting a zero-tolerance position on sexual relationships with clients; and introducing mandatory cultural competency requirements, which encompass race and gender, that are embedded across all CPD.

Sexual harassment, bullying and discrimination have lasting effects. The 2018 Legal Workplace Environment Survey revealed that 39 percent of lawyers who experienced sexual harassment felt it affected their mental or emotional wellbeing.[141] Moreover, almost one in three lawyers said it affected their job or career prospects and one in five lawyers resigned from their job.[142] Encouraged by the 30 years of transformation undergone by the health profession in the wake of its watershed moment, we look forward from the Independent Report and envision what the improved legal profession would look like in 2048. This opportunity to stamp out sexual harassment, bullying and discrimination within the legal profession must not be missed.

140 NZLS, above n 2; and NZLS, above n 57, at 5-6.
141 NZLS, above n 2, at 24.
142 NZLS, above n 141.

RECOGNITION AND RELEVANCE OF INDIGENOUS RIGHTS: ADDRESS TO THE AUCKLAND WOMEN LAWYERS' ASSOCIATION

Valmaine Toki*

The following was first delivered for the Auckland Women Lawyers' Association 2023 Dame Sylvia Cartwright Lecture. The lecture draws on content in Professor Toki's upcoming book "Indigenous Rights, Space, Climate Change, Governance, Measuring Success and Data" and her recent studies as a member of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, to explore the recognition and relevance of Indigenous rights.

Given the current situation in Palestine where the Indigenous peoples, including the Bedouin, the al-Ramadin and the al-Rshaida peoples, live in a constant state of fear caused by the demolition and confiscation of their property, the restriction of their rights of circulation and the impact of militarisation on Indigenous women, this topic is timely. Understanding that Israel refrained from voting for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), during the General Assembly vote in 2007, raises the question: if Israel had voted to support UNDRIP, would this have made a difference?

In April 2023 António Guterres, the Secretary-General of the United Nations (UN), declared that the UN is "committed to keep promoting the rights of Indigenous Peoples in policies and programming at all levels – and to amplify your voices".[1] He stated "[l]et us learn from and embrace the experiences of Indigenous Peoples worldwide".[2] A central feature of such experiences is

* Professor Toki (Ngāti Rehua, Ngāpuhi) BA LLB (Hons) MBA LLM PhD. University of Waikato. Professor Toki was the first Māori and New Zealander appointed by the President of UN Economic and Social Council to the United Nations Permanent Forum on Indigenous Issues (UNPFII), serving two terms and the first Māori and New Zealander appointed by the President of the UN Human Rights Council to the UN EMRIP.

1 António Guterres "Secretary-General's remarks at Opening Ceremony of the 22nd Session of the UN Permanent Forum on Indigenous Issues" (United Nations General Assembly, New York, 17 April 2023).

2 Guterres, above n 1.

the intrinsic relationship which Indigenous peoples have with their lands, territories and resources: a relationship that is premised on reciprocity and interdependence. Nonetheless, recognition of Indigenous rights has been problematic and contested inside a state-orientated regime. In seeking redress for marginalisation by the state, Indigenous peoples have historically relied on the intervention of the previous League of Nations and the current UN to realise their fundamental rights.

To unpack the recognition and relevance of Indigenous peoples' rights, three areas will be discussed. First, Part I will provide examples of how Indigenous peoples have always advocated for their basic rights despite the challenges they face. Second, Part II will reflect on recent studies advanced by the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), including the study on "Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration"[3] and a study on militarisation, with a focus on the impacts on Indigenous women. Finally, Part III will offer some thoughts on a recent UN country visit to Western Australia to review policies and legislation on child uplift.

I INDIGENOUS PEOPLES' ADVOCACY

As a distinct social and cultural group sharing collective ties, Indigenous peoples are estimated to number 476 million worldwide.[4] They comprise only six percent of the global population and yet account for 19 percent of the extreme poor, with a life expectancy of up to 20 years lower than non-Indigenous peoples.[5] Indigenous peoples maintain their unique connection with their lands, territories and resources and are the holders of traditional knowledge and linguistic and cultural diversity. Occupying a quarter of the world's surface area, Indigenous peoples safeguard 80 percent of the world's remaining

3 Expert Mechanism on the Rights of Indigenous Peoples "Call for Input" (January 2024) United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/en/calls-for-input/2024/call-inputs-study-laws-legislation-policies-constitutions-judicial-decisions>.

4 Amnesty International "Indigenous Peoples" <https://www.amnesty.org/en/what-we-do/indigenous-peoples/#:~:text=Overview,5%25%20of%20the%20world's%20population>.

5 World Bank "Indigenous Peoples" <https://www.worldbank.org/en/topic/indigenouspeoples#:~:text=There%20are%20an%20estimated%20476,of%20non%2DIndigenous%20Peoples%20worldwide>.

biodiversity.[6] Intrinsic to this stewardship is their ancestral and traditional knowledge on how to adapt, mitigate and reduce issues such as climate change and disaster risks. Indigenous peoples have extensively advocated for their fundamental rights and, when domestic advocacy is unavailing, they have appealed to both international law and international fora.

The long history of Indigenous peoples advocating for their rights is well-documented. Last year, in 2023, Indigenous peoples commemorated the 100-year anniversary of the advocacy of Deskaheh Levi General, Chief of the Young Bear Clan, and spokesperson of the Six Nations of the Grand River near Brantford, Ontario with a huge celebration during the EMRIP July session in Geneva. In 1923, Deskaheh led a significant campaign to the League of Nations in Geneva to seek redress for Canada's breaches of the Indian Act 1876. Despite requests from representatives from Ireland, Estonia, Panama and Persia that the President of the League provide an opportunity for Deskaheh to be heard, England — occupying a position of strength after World War One — removed this from the agenda, citing that it was an internal matter for the British Empire and for Canada.[7]

Similarly, the following year another Indigenous leader, Tahupōtiki Wiremu Rātana, from Aotearoa New Zealand, travelled to the League of Nations seeking recourse for the state's breaches of the rights guaranteed under Te Tiriti o Waitangi.[8] Although both appeals were ultimately unsuccessful, both concerned the recognition of Indigenous rights to lands, territories and resources. The results were a reflection of the time, during which League members were unwilling to accept claims of sovereignty when they conflicted with the interests of member states. When the League of Nations collapsed in the 1930s, the UN, which was arguably more favourable to the recognition of Indigenous peoples' rights, was established. However, today we must question the effectiveness of the UN, and particularly the UN Security Council, given the recent use of its veto power to stymie measures and resolutions that seek to establish peace and security.

6 World Bank (2008). Social dimensions of climate change: workshop report, World Bank, Washington, DC. As cited in Australia State of the Environment Report 2021 <https://soe.dcceew.gov.au/climate/management/national-and-international-frameworks#-cli-21-figure-21-indigenous-peoples-and-the-environment>.

7 S J Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishing, California, 2010) at 29–32.

8 Anaya at 41.

Subsequently, the Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the UN General Assembly. In 2023 the 75th anniversary of the UDHR was celebrated in Chile and Chile was recognised as the newest member of the UN Human Rights Council. This was momentous, given that the Chilean leader, Hernán Santa Cruz, was one of the drafters of the UDHR.

In 1966, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although both conventions were progressive, they did not explicitly recognise the rights of Indigenous peoples. It was only with the United Nations Declaration on the Rights of Indigenous Peoples in 2007 that we saw the fundamental rights of Indigenous peoples recognised. In addition, the three institutional UN mechanisms mandated within the area of Indigenous peoples' rights — the United Nations Permanent Forum on Indigenous Issues (UNPFII), the EMRIP and the UN Special Rapporteur on the Rights of Indigenous Peoples — were established, collectively representing a momentous change for Indigenous peoples.

The UNPFII and EMRIP provide an extraordinary opportunity to hear from voices representing the seven sociocultural regions of the world. This environment provides a rich tapestry of discussion and insight into issues that arise within the different regions, with Indigenous experts from Russia, Latin America, Africa, Asia, the Arctic, the Pacific and North America. The UNPFII and EMRIP mechanisms also afford members the opportunity to meet with heads of state, UN country teams and Indigenous communities. As such, members gain diverse insights that enrich the studies and reports advanced by these mechanisms.

A Challenges

Despite these recent gains, challenges remain for Indigenous peoples — first, minority rights may impact on Indigenous rights, second, is the conflation of Indigenous peoples with "local communities", and third, establishing Indigenous peoples' standing within the UN system.

First, although Indigenous peoples may demographically be the minority in some jurisdictions, this does not define Indigenous peoples, nor does it mean that the rights of Indigenous peoples will automatically attach if a group is numerically a minority. The definition of minority employed by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention

of Discrimination and Protection of Minorities, is generally regarded as the best working definition in international law. He defines a "minority" as a group which is numerically inferior to the rest of the population and in a non-dominant position, whose members possess characteristics differing from those of the rest of the population and show a sense of solidarity, seeking to preserve their shared culture, religion or language.[9]

Minority rights are protected by the UN Declaration on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, and explicitly by art 27 of the ICCPR. Article 27 provides that in those states in which ethnic minorities exist, such minorities shall not be denied the right to enjoy their own culture. Prior to UNDRIP, to advance rights of Indigenous peoples' reliance was placed on international instruments, such as the ICCPR, that refer to minority rights and cultural rights, but not Indigenous peoples' rights. In Aotearoa New Zealand, the *Mahuika* case is often referred to in terms of using the right to culture captured in art 27 as a window to import the right of customary fishing.[10] This is an example of how creative Indigenous peoples have been prior to the adoption of UNDRIP in 2007 in seeking the realisation of their rights.

The Indigenous rights movement differentiates from minority rights and emphasises that Indigenous rights and identity are quite distinct. Although minority groups do share certain criteria with Indigenous peoples such as non-dominant position, language and traditions, they are distinct in that Indigenous peoples have a unique relationship with their lands, territories and resources that is underscored by their cultural ethos. In this regard, the High Court of Kenya has differentiated Indigenous minorities in Kenya from other Kenyan tribes by emphasising that the former have a strong attachment to their culture as opposed to the homogeneous ones who have adapted to change with very little attachment to their old ways.[11]

The second challenge is the conflation of Indigenous peoples with local communities. This concept is referred to by the term IPLC (Indigenous peoples and local communities), which is widely employed by international organisations and conventions to refer to individuals and groups who self-identify as Indigenous or as members of distinct local communities.

9 Francesco Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Doc E/CN.4/Sub.2/384/Rev. I (1977) at 28.

10 *Apirana Mahuika et al. v New Zealand* UN Doc CCPR/C/70/D/547/1993 (16 November 2000).

11 *Lemeiguran and Others v Attorney-General and Others* (2006) AHRLR 281 (KeHC) at [102].

United Nations entities like the Convention on Biological Diversity and the World Bank employ this terminology within their policies and programmes.

Why is this so problematic? The rights of Indigenous peoples are captured primarily within UNDRIP, including an Indigenous right to practise and revitalise cultural traditions, customs, to manifest practice, develop and teach their spiritual religious traditions, customs and ceremonies.[12] Local communities, on the other hand, do not have the same recognition nor a respective international instrument that recognises similar rights. The term IPLC is proposed as a way to take a bicultural approach to conservation, but in doing so weakens the fundamental rights for Indigenous peoples that are affirmed within UNDRIP.

In addition, the term IPLC has been imposed without consulting Indigenous peoples. Given that Indigenous communities cover approximately 25 percent globally and hold 80 percent of the global diversity, sharing this traditional knowledge or rebranding traditional knowledge as IPLC is problematic and overlooks key matters such as the effect of colonial practices and structures on Indigenous peoples. This conflation of the two terms compromises and distorts the fundamental rights of Indigenous peoples, overlooking the complexities and the unique connection between Indigenous peoples and their lands, territories and the environment.

Unlike local communities, Indigenous peoples have historically been politically organised in their struggle to secure recognition of their distinct rights and status by the international community. Local communities do not appear to hold the same historical and self-organised grouping within any international, intergovernmental organisations. For Māori, Indigenous peoples of Aotearoa New Zealand, to be Indigenous is to have a whakapapa, an intrinsic relationship with lands, territories and resources guided by tikanga Māori. This unique relationship cannot be held by a local community. The continual conflation of Indigenous peoples with local communities by member states and intergovernmental organisations diminishes the distinct rights and status of Indigenous peoples. This undermining of Indigenous rights by states and intergovernmental organisations is disappointing.

Indigenous peoples should not be grouped or conflated with local communities for three reasons. First, grouping Indigenous peoples with local communities adversely impacts on the distinct rights and status of Indigenous

12 *United Nations Declaration on the Rights of Indigenous Peoples* A Res 61/295 (2007), arts 11 and 12.

peoples, suggesting a disingenuous equivalency of rights between Indigenous peoples and local communities. Second, the term "local communities" has not been explicitly defined by states or UN agencies and remains uncertain. Grouping Indigenous peoples with local communities therefore has the potential to undermine the effectiveness and impact of Indigenous advocacy. It also impacts on the recognition and advancement of the fundamental rights of Indigenous peoples, including but not limited to, equitable participation. Although Indigenous peoples may be part of a local community, it is being Indigenous that defines them, not being a member of that local community. Third, local communities are already part of, and represented by, the state. Conflating Indigenous peoples and local communities therefore provides a platform to a constituency that is already represented by states.

However, in 2023 the UNPFII, EMRIP and the Special Rapporteur released a joint statement to unequivocally request that all UN member states who are parties to treaties related to the environment, biodiversity and climate change cease using the term local communities alongside Indigenous peoples, so that the term Indigenous peoples and local communities is no longer used.

The third challenge is that of enhanced participation of Indigenous peoples at the UN. Indigenous peoples do not enjoy the same standing within the UN as member states. For instance, they cannot vote on a UN General Assembly resolution. Despite the achievements (of adopting UNDRIP and establishing the three Indigenous mandated mechanisms (UNPFII, EMRIP and the Special Rapporteur)), Indigenous bodies are recognised at a national level through treaties and other constructive arrangements. This means they do not hold the same recognition within the UN and do not enjoy the same position and rights as member states, or even registered non-governmental organisations (NGOs).

In light of this, the EMRIP proposed the UN Human Rights Council encourage the UN General Assembly to adopt measures to ensure Indigenous peoples' governance bodies and institutions are able to participate at the UN as observers with a minimum of the same participatory rights as NGOs. This request built on previous appeals to the UN Human Rights Councils regarding ways and means of promoting participation at the UN of recognised Indigenous peoples' representatives on issues affecting them; and how such participation might be structured.

Consultations in 2016 and 2017 culminated in the UN General Assembly adopting a resolution entitled "Enhancing the Participation of Indigenous Peoples Representatives and Institutions in Meetings of Relevant UN Bodies on Issues Affecting Them".[13] In recognising the importance of Indigenous participation at the UN, the EMRIP during its recent session this year provided the following relevant proposals to the UN Human Rights Council:[14]

> … to continue to facilitate, in consultation with Indigenous peoples, the participation of representative institutions of Indigenous peoples in the work of the Council, in accordance, with the Declaration and to commit to reducing the barriers, including language barriers, in order to allow for participation of Indigenous peoples in the work of the Council.

To progress this, EMRIP invited the Human Rights Council to convene four two-day Expert workshops, ensuring the participation from the seven indigenous sociocultural regions and to prepare an informal record and to submit it to the Council prior to its 59th Session. This illustrates that the work of the EMRIP reaches not only into communities, but also reaches up to the UN Human Rights Council in terms of the issues that Indigenous peoples face.

To conclude this section, Indigenous peoples have long advocated for the recognition of their fundamental rights. The UNDRIP articulates and captures these fundamental rights, including that key right of self-determination in art 3, which colours the additional rights including those concerning lands, territories and resources. Despite the current initiatives that recognise Indigenous peoples, including UNDRIP, the UNPFII, the EMRIP and the Special Rapporteur, ongoing and emerging challenges for Indigenous peoples continue to arise. These include comparisons with minorities, the conflation of Indigenous peoples and local communities, and the continuing call from Indigenous peoples for enhanced participation at the UN. Indigenous peoples have a long history of unapologetic advocacy. In light of new sets of challenges, that advocacy will hold Indigenous peoples in good stead.

13 *Enhancing the Participation of Indigenous Peoples Representatives and Institutions in Meetings of Relevant UN Bodies on Issues Affecting Them* GA Res 71/321 (27 July 2020).

14 *United Nations Expert Mechanism on the Rights of Indigenous Peoples* 2023 Proposals to the Human Rights Council (2023) at 1.

II RECENT STUDIES

A Analysis of Laws, Legislation, Policies, Constitutions, Judicial Decisions and Other Outcomes Concerning How States Have Taken Measures to Achieve the Ends of the UN Declaration Consistent with Article 38

The EMRIP's 2023 annual report to the UN Human Rights Council decided that its next annual study on the status of the rights of Indigenous peoples worldwide would analyse laws, legislation, policies, constitutions, judicial decisions and other mechanisms. It intended to look at the ways in which member states had taken measures to achieve the ends of the UNDRIP, in accordance with art 38 of the UNDRIP.[15] An EMRIP seminar was held in Costa Rica at the University of Peace, from which Indigenous experts from the seven sociocultural regions, including Professor Gordon Christie from University of British Columbia, contributed to a very rich and fruitful discussion in terms of how different jurisdictions apply the Declaration.

The orthodox perspective of the Declaration is one of soft law: it is aspirational and not legally binding upon the state unless incorporated into legislation or a constitution. The doctrine of state sovereignty provides restrictions on international instruments, such as a declaration, to regulate matters within the realm of the state. In the absence of direct incorporation through statute, there are different methods of recognising international human rights instruments, including recourse through administrative law. The concepts of legitimate expectation, mandatory relevant consideration, the presumption of consistency and the common law principle of statutory interpretation recognise that Parliament has presumed not to legislate intentionally in breach of its obligations.

Regarding case law, there is a valuable resource in the extensive database of cases in Latin America where courts refer to UNDRIP. The Aotearoa New Zealand Supreme Court bench has also been referring to UNDRIP in judgments. In Canada, of interest when considering judicial legitimacy and the key right of self-determination for Indigenous peoples, Professor Joshua Nichols suggested that if the path to internal self-determination becomes perpetually

15 *Annual Report of the Expert Mechanism on the Rights of Indigenous Peoples* UN DocA/HRC/54/64 (2023) at [101].

frustrated then the binding effect of judicial legitimacy can suddenly give way, questioning the constitutional legitimacy of Crown sovereignty.[16]

In Aotearoa New Zealand, a national action plan has been proposed, albeit without success at this stage. However, there are other ways to breathe life into these rights and doing so may help to give legal effect to these rights. One option is considering tikanga Māori, and now that Justice Glazebrook has tantalisingly mentioned tikanga Māori as a third source of law, this is an intriguing position to be explored.[17]

But more is required to normalise the application of international obligations. Judicial evolution of norms and rules takes time, so alternative methods to realise and implement the rights of UNDRIP are worthwhile to consider. Canada, for example, is very progressive in this space and has enacted a Declaration Act to ensure laws to be passed will be consistent with UNDRIP.[18]

Another option could be *asserting* these rights rather than waiting for those rights to be legally recognised or enforced. This subtle shift in language, from enforcing to asserting rights and existing norms starts with an entirely new and forward-focused mindset. Fundamental rights exist irrespective of whether they are captured in UNDRIP or not. They do not need to be captured within a declaration for their legitimacy or to prove existence. For instance, Māori do not wait for the legal recognition of their right to speak their language. Māori do so as an exercise their right of tino rangatiratanga, which through time becomes a normative right.

B Impact of Militarisation on Indigenous Women

The second EMRIP study concerns the impact of militarisation on the rights of Indigenous peoples and is particularly relevant given the current environment. Following UN Human Rights Council resolution 33/25, EMRIP decided to prepare a report on the militarisation of Indigenous lands, territories and resources. To inform the study, EMRIP posted a call for written contributions and an expert seminar was held by the University of British Columbia.

The study centres on the principle of Indigenous peoples' territories' right to be free from military activities and connects with rights within UNDRIP.

16 Robert Hamilton and Joshua Nichols "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 ALR 729 at 752.

17 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [111], referring to *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801: "This Court in *Trans-Tasman* left open whether tikanga is a separate or third source of law".

18 United Nations Declaration on the Rights of Indigenous Peoples Act SC (2021) c 14.

Article 7, for example, provides for the right to security as distinct peoples and for the prohibition of genocide and forcible transfer. Articles 8 and 10 reiterate the right not to be forcibly removed or assimilated, the importance of free, prior and informed consent and effective mechanisms for redress. Articles 26, 29 and 31 provide for the right to maintain control over the lands, territories and resource. Articles 3, 18, 19 and 33 provide the right to participate in decisions affecting their lands and territories. Collectively these articles provide the basis of discussions on the impact of militarisation on Indigenous peoples, and support demilitarisation and decolonisation of Indigenous lands and territories.

With respect to how militarisation impacts on Indigenous women, the study noted that art 22.2 of UNDRIP directs states to take measures to ensure Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination, individually and collectively. Human rights advocate and previous UN Special Rapporteur on Violence against Women and Girls, Reem Alsalem, notes the:[19]

> … collective dimension to the violence that Indigenous women and girls face when considering the impact of militarisation, is often overlooked, but it forms an important part of their experience of violence.

The EMRIP study highlighted that "during armed conflict, sexual and gender-based violence is used as a weapon to weaken the resolve of Indigenous peoples in militarised disputes over land and resources".[20] The examples within the study included reported cases of women and girls in Bangladesh being subjected to sexual violence in front of their family and community members;[21] gang rape, sexual enslavement and killing of Indigenous women and girls in India, Kenya, Myanmar, Nepal, the Philippines, Thailand and Timor Leste;[22] and Indigenous women in Panama fearing sexual assault by military members stationed in their territory.[23] In Okinawa, Japan, once the kingdom of the Ryūkyū, women and girls face high rates of sexual violence and

19 Reem Alsalem *Violence against Indigenous Women and Girls*, 50 UN Doc A/HRC/50/26 (21 April 2022) at 71.

20 *Impact of Militarization on the Rights of Indigenous Peoples*, 54 UN Doc A/HRC/54/52 (8 August 2023) at 57.

21 At 57, referring to a submission from Minority Rights Group International.

22 See also Victoria Tauli Corpuz *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 30 UN Doc A/HRC/30/41 (6 August 2015).

23 *Impact of Militarization on the Rights of Indigenous Peoples*, above n 20, at 58.

domestic violence and impunity due to lack of effective remedies;[24] in Nepal, Indigenous women and girls account for 80 percent of trafficked persons;[25] and in Papua New Guinea, security guards and police at Barrick Gold's Porgera joint venture mine were involved in sexually assaulting women.[26] The Special Rapporteur on Violence against Women and Girls has reported that "the increase in armed clashes since late 2018 between Indonesian security forces and pro-Papua armed independence groups are examples of conflict that has an impact on Indigenous women".[27]

Unsurprisingly, the Special Rapporteur on the Rights of Indigenous Peoples has received:[28]

> … allegations of sexual harassment and abuse by military personnel against women and girls peacefully demonstrating and has issued many press releases to address discrimination, violence and attacks against and killings of Indigenous women and girls, including in Guatemala, Honduras, Colombia, Brazil and also the Philippines.

The Special Rapporteur has noted that due to women being primarily responsible for food, water, fuel and medicine gathering, they are exposed to risks of sexual violence from militarised security forces, park rangers and enforcement officers.[29]

C Prevention Mechanisms and Reparation

As a result of armed conflict, it is not unusual for Indigenous women and girls to flee the difficult socioeconomic conditions and situations, given their vulnerability to trafficking, sexual exploitation and sexual violence.[30] However, despite the difficulties associated with the militarisation of their lands and territories, in Myanmar, Indigenous women have established a vouching system where women who have taken part in consultations can reach out to those who may hesitate to do so.[31] In Colombia additional prevention

24 At 59.
25 At 61, referring to a submission from the International Work Group for Indigenous Affairs.
26 At 27.
27 Alsalem, above n 19, at 27.
28 *Impact of Militarization on the Rights of Indigenous Peoples*, above n 20, at 57.
29 At 58.
30 At 61.
31 At 62.

mechanisms include early warning mechanisms at the national level to prevent human rights violations against Indigenous Peoples. This includes:[32]

> … an early warning alert on the risk of Indigenous children and teenagers being recruited by illegal armed groups, which could result in violations as well as confrontations with State armed forces, militarization of the territories and stigmatization of the communities.

As Indigenous women and children are particularly vulnerable to the violence associated with the militarisation of Indigenous lands and territories, women as victims are considered the cornerstone to any grievance and reconciliation process.[33] Such a process would include mechanisms to ensure accessibility for women, such as community-based reporting and anonymity.[34]

The study provided a positive example regarding reparation for Indigenous women during militarisation:[35]

> In February 2016, the Guatemalan Court for High-Risk Crimes convicted two former military officers of crimes against humanity and approved reparations for 11 Indigenous Q'eqchi' women who had been subjected to sexual violence during the country's 30-year conflict. The Sepur Zarco case was the first case of conflict-related sexual violence challenged under the Guatemalan penal code. It was the first time that a national court had considered charges of sexual slavery during an armed conflict – a crime under international law.

D Recommendations

Every EMRIP study contains recommendations, and two relevant recommendations within this study included:[36]

> 14. States should protect the rights of women and girls to be free from violence resulting from militarization and should ensure effective remedies for women who have been victims of such violence.
>
> 15. States should ensure that Indigenous women are included in any consultation processes under article 30 of the Declaration. Indigenous

32 At 65.
33 At 73.
34 At 74.
35 At 75.
36 At 20, recommendations 14 and 15.

women's role in protecting their communities from the impact of militarization should be recognised.

III COUNTRY ENGAGEMENT: A WESTERN AUSTRALIA CASE STUDY

Under its revised mandate, EMRIP assists member states and Indigenous peoples in achieving the ends of UNDRIP. EMRIP also provides technical assistance at the request of states, Indigenous peoples and other stakeholders, including the private sector.

EMRIP can provide technical advice regarding the development of domestic legislation and policies relating to the rights of Indigenous peoples. In the Western Australia case, EMRIP provided advice and response to requests by the Noongar Family Safety and Wellbeing Council with respect to the contemporary removal of Aboriginal children. The Noongar peoples are based in Western Australia.

The request was centred on the understanding that certain legislative frameworks and policies do not align with the key articles of UNDRIP, including the right of self-determination, non-discrimination, the prohibition against forced assimilation and the removal of people from their traditional lands and territories.

A Background

In 2017, the Special Rapporteur on the Rights of Indigenous Peoples noted a deterioration in all quality-of-life indicators from 2009 to 2017 in Australia for those reported on, and that Indigenous children were overrepresented in out-of-home care, and several other negative statistics.[37] She noted that multiple factors fed into the overrepresentation of Indigenous children in child protection and detention systems. These included the high rates of homelessness, overcrowding and poor housing in Indigenous communities, which in turn are linked to the high rates of Indigenous children entering child protection and youth detention systems. In addition, she noted that Indigenous children were overrepresented in incarceration statistics, the disproportionate

37 *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, 36 UN Doc A/HRC/36/46/Add.2 (8 August 2017) at 11.

statistics due in part to the age of criminal responsibility being set at 10 years, below international standards.[38]

Additionally in 2017, the UN Committee on the Elimination of Racial Discrimination (CERD) raised serious matters concerning the disproportionate number of Indigenous children within the criminal justice system in Australia, with particular concern regarding the treatment of young people in detention centres. CERD noted, also with concern, that Indigenous children are at "higher risk of being removed from their families and placed in alternative care facilities".[39] Some of the CERD recommendations included raising the minimum age of criminal responsibility and addressing the over representation of Indigenous children in care.[40]

Noting that "child removal in itself constitutes a form of violence against women", the Special Rapporteur on Violence Against Women observed that there exists an inappropriate approach to Aboriginal and Torres Strait Islander (ATSI) victims of family violence in which the victims are blamed for exposing children to violence, rather than being supported to care for their children.[41] While measures had been taken to address violence against women and children in Australia, the Special Rapporteur noted that these measures need to be implemented with closer engagement with Indigenous communities and should not be outsourced to non-Indigenous organisations.[42]

Despite the implementation of the ATSI Child Placement Principle in 1983, which aimed to prevent out-of-home care and ensure culturally connected placements in collaboration with families, the Special Rapporteur on the Rights of Indigenous Peoples noted in 2016 that ATSI children comprised 36 percent of children in out-of-home care (up from 20 percent in 1997), and that this figure was rapidly increasing. Only 66 percent of ATSI children requiring child protection measures were placed within their own communities.

Building on the need for closer engagement with Indigenous communities, the Special Rapporteur on the Rights of Indigenous Peoples recommended greater engagement by the government with ATSI communities, including

38 At 75.

39 *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18-20(26 December 2017) at 25.

40 At 26.

41 *Report of the Special Rapporteur on Violence against Women, its Causes, and Consequences on Her Mission to Australia*, 38 UN Doc A/HRC/38/47/Add.1 (17 April 2018) at 46.

42 At 49.

community-led intervention programmes to avoid the need for out-of-home care in the first instance, the establishment of Aboriginal children's commissioners to monitor the situation, and consultation with Indigenous organisations to develop a national strategy to eliminate overrepresentation of ATSI children in care.[43]

B Current Visit

Despite these recommendations and reports, statistics indicate that as of 30 June 2021, there were 22, 297 ATSI children in out-of-home care. By 2030, this is projected to increase by 54 percent. Seventy-nine percent of these children are permanently living away from their birth parents. Aboriginal children are 10 times more likely to be in out-of-home care than non-Indigenous children, with rates particularly high in Western Australia.

This over-representation has increased consistently over the last 10 years. These rates are unacceptable. A different approach is required: one that is consistent with the fundamental rights in UNDRIP, particularly the right of self-determination.

Indigenous organisations are contracted to deliver services to the community concerning child safety and child uplift. These Indigenous organisations are NGOs. Accordingly they do not necessarily reflect all Indigenous peoples, calling into question how Indigenous issues are represented and advocated for more generally. In addition, the reliance on discretionary government funding raises questions of independence and places NGOs at the whim of the Commonwealth government and their inclination towards mainstream rather than Indigenous programmes. It is disappointing that the 2023 Australian Indigenous Voice referendum was not successful, and it represents a lost opportunity to address issues such as Indigenous child removal in Western Australia.

However, in Western Australia there is an existing "treaty arrangement" between the South West Native Title Settlement (Noongar peoples) and the Western Australian Government that is underscored by a set of principles and priorities aimed at improving the Noongar community development opportunities.[44] The South West Native Title Settlement framework seeks to

43 *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, 36 UN Doc A/HRC/36/46/Add.2, above n 37.

44 Harry Hobbs and George Williams "The Noongar Settlement: Australia's First Treaty" (2018) Sydney Law Review 40:1.

provide greater scope for direct communication and collaboration between the Western Australian Government and the Noongar people. This is a "treaty-based arrangement" of partnership between government and Indigenous peoples built on, and informed by, the rights to culture and self-determination. It allows the experiences and values of Indigenous peoples to inform and operate Indigenous child welfare systems, to counteract the existing colonial attitudes to Indigenous children and Australia's child welfare system and, ultimately, ameliorate the overrepresentation of indigenous children in out-of-home care. It achieves this by applying Aboriginal programmes that are underscored by Aboriginal culture, and an approach that is accountable to the community, not to the government.

On a similar basis, in Aotearoa New Zealand, Ngāti Kahungunu Iwi Incorporated launched Te Ara Mātua, a bespoke iwi-led partnership between Oranga Tamariki – Ministry for Children and iwi, which assists iwi and local organisations to be more involved in decision making from the outset when whānau require intervention and support. This inclusion of iwi and tikanga aligns with Luke Fitzmaurice-Brown's view, who considered that the displacement of the practice of tikanga through colonisation a major factor in the overrepresentation of Māori in family violence and child protection statistics.[45] Fitzmaurice-Brown observed that the current legal framework is not delivering positive results for Māori, despite an apparent shift in focus by organisations such as Oranga Tamariki, and considered that tikanga can be incorporated into child protection law without causing further harm through a kaupapa Māori approach.[46]

IV CONCLUSIONS

Despite the gains, challenges remain for Indigenous peoples in the international recognition of their rights, including those to the Indigenous right not to be merged with minorities or local communities, to be afforded standing at the UN, to take steps to realise the fundamental rights in UNDRIP, to be free from militarisation and to ameliorate the overrepresentation of Indigenous children in out-of-home care. The common factor contributing to overcoming ongoing issues, including colonisation, is self-determination or tino rangatiratanga.

45 Luke Fitzmaurice-Brown "Te Rito O Te Harakeke: Decolonising Child Protection Law In Aotearoa New Zealand" (2022) 53 VUWLR 507.

46 At 528–531.